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No. 201

In the Supreme Court of the United States

October Term, 1940.

LEON C. PHILLIPS, INDIVIDUALLY, AND AS GOVERNOR OF THE STATE OF OKLAHOMA, MAC Q. WILLIAMSON, INDIVIDUALLY, AND AS ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, ET AL., ETC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, GRAND RIVER DAM AUTHORITY, RAY McNAUGHTON, ET AL., ETC.,

Appellees.

Appeal from Interlocutory Injunction Granted by the District Court of the United States for the Northern District of Oklahoma, Sitting as a Three-Judge Court.

BRIEF of APPELLANTS.

✓ MAC Q. WILLIAMSON,
Attorney General of the
State of Oklahoma,

✓ RANDELL S. COBB,
First Assistant
Attorney General,

✓ JOHN B. DUDLEY,

✓ GEORGE S. RAMSEY,

VILLARD MARTIN,

GARRETT LOGAN,

Attorneys for Appellants.

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OR OF THE STATE OF OKLAHOMA, MAC Q. WILLIAM-
SON, INDIVIDUALLY, AND AS ATTORNEY GENERAL
OF THE STATE OF OKLAHOMA, ET AL., ETC.,**

Appellants,

vs.

**THE UNITED STATES OF AMERICA, GRAND RIVER
DAM AUTHORITY, RAY McNAUGHTON, ET AL., ETC.,**

Appellees.

***Appeal from Interlocutory Injunction Granted by the Dis-
trict Court of the United States for the Northern District
of Oklahoma, Sitting as a Three-Judge Court.***

BRIEF for APPELLANTS.

Opinion Below.

The lower court filed findings of fact and conclusions of law (*United States v. Phillips*, 33 F. Supp. 261) but did not file or deliver any opinion at the time of granting the interlocutory injunction or at any other time.

Jurisdiction.

This is an appeal from an order of a specially consti-
tuted District Court, consisting of three judges, entered

April 25, 1940, granting an interlocutory injunction. The jurisdiction of this court rests on section 380, title 28, U. S. C. A. (section 266, as amended, of the Judicial Code), and on the following opinions of this court: *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16; *Oklahoma Gas & Electric Company v. Oklahoma Packing Company*, 292 U. S. 386; *International Ladies' Garment Workers' Union v. Donnelly Garment Company*, 304 U. S. 243; *William Jameson & Company v. Morgenthau*, 307 U. S. 171; and *Rorick v. Board of Commissioners of Everglades Drainage District*, 307 U. S. 208.

Introductory Statement.

Grand River Dam Authority is a corporation organized under the laws of Oklahoma (Ch. 70, Art. 4, S. L. Okla. 1935; Ch. 70, Art. 1-2, S. L. Okla. 1936-7; Ch. 70, Art. 1-2, S. L. Okla. 1939) to construct a dam across Grand River, a non-navigable stream. The United States gave it a grant of \$6,562,500.00 and purchased \$11,563,000.00 of its bonds, which are payable only out of revenues of the project.

As the dam neared completion, there remained unsettled a controversy between the Authority and the State Highway Commission over payment for roads and bridges to be flooded by the waters impounded on closing the dam.

On March 13, 1940, the Governor of the State of Oklahoma called out the militia to prevent the completion and closing of the dam and the ensuing destruction of roads and bridges; and instructed the Attorney General of Oklahoma to bring suit to protect the State's rights. The next day, March 14th, the Attorney General filed in a state court a suit wherein the State of Oklahoma, on the relation of the Governor and the State Highway Commission, was plaintiff and the Authority, its Board of Directors, and others were

defendants. The United States was not made a party. The state court issued a temporary restraining order, returnable March 20, 1940, restraining building of certain arches of the dam above a stated height and restraining the closing of the dam gates.

On March 19, 1940, the United States filed the case at bar and obtained a temporary order restraining the Governor and the Adjutant General from use of the militia to interfere with completion of the dam, and restraining the Governor, the Attorney General and the State Highway Commission from prosecuting the state court suit. By reason of such order, no further proceedings have been had in the state court.

Thereafter a three-judge court was convened (28 U. S. C. A., Sec. 380; Sec. 266, Judicial Code, as amended). It issued a temporary injunction, and the case is in this court on appeal therefrom.

Statement of the Case.

Identification of parties (complaint, R. 1, 2; Findings 1, 2, 3, 4, 6, 7, 8, 9, R. 245, 246).

Leon C. Phillips is Governor of the State of Oklahoma, and Commander in Chief of its National Guard and Militia.

Mac Q. Williamson is Attorney General of the State of Oklahoma.

Louis A. Ledbetter is Adjutant General of the Oklahoma National Guard.

S. H. Singleton, George Meacham and H. E. Bailey are members of the Oklahoma State Highway Commission.

Grand River Dam Authority (hereafter called the Authority) is a corporation organized under the laws of Oklahoma (to construct a dam across Grand River, a non-navigable stream).

McNaughton, Eichenberger, Ward, Colley and Dun are members of the Board of Directors of the Authority; P. Clonts is its General Manager, and W. R. Holway, Consulting Engineer.

Massman Construction Company is the general contractor with the Authority for construction of the dam across Grand River.

The First National Bank of Miami is trustee under deed of trust securing the bonds issued by the Authority.

Financial interest of United States.

To enable it to build the dam, the Authority obtained from Public Works Administration an allotment for a loan of \$11,563,000.00 and a grant of not more than \$8,437,000. (Complaint, R. 3.) At the time of the trial \$6,562,500.00 of the grant had been paid (Finding 18, R. 248; R. 293), and the United States had purchased bonds of the total principal sum of \$11,563,000.00. (Finding 14, R. 247; R. 291) The bonds are payable solely from the revenues of the project and are secured by Trust Indenture dated as of April 1938. (Findings 14, 17, R. 247) The Public Works Administration holds these and other bonds for sale to investors. (R. 290-291)

Controversy over roads.

Section 2-h of the act creating the Authority provided that it shall have the power:

“to overflow and inundate any public lands and public property and to require the relocation of roads and highways in the manner and to the extent necessary to carry out the purposes of this Act; *provided* that said District shall be liable in damages to the State of Oklahoma, and/or any sub-division thereof, for any injury occasioned or expenses incurred by reason thereof (Chap. 70, Art. 4, Sess. Laws, Okla. 1935.)

The Authority's liability to the State for destruction of state roads gave rise to a controversy between the Governor, Highway Commission and the Authority. (Finding 39, R. 251)

It was stipulated that a controversy existed as to whether or not there had been a settlement between the Authority and the State Highway Commission for damages caused by inundation of the state roads and bridges (R. 390), but the merits of the claim as to the existence or non-existence of such a settlement was not an issue tried at the hearing below. (R. 377, 378, 387)

NOTE: It was and is the Government's position that any claim of the State for such damages was inferior in rank to the lien of the trust indenture securing the bonds owned by the United States. (Complaint, R. 1, 5, 8) It was and is the State's contention that the Authority must pay for the roads before it could inundate them.

Governor Phillips called on Mr. John Carmody (who was appointed Administrator of Public Works Administration July 1, 1939) (R. 374) and talked to him about the road situation and Mr. Carmody referred the matter to his legal staff, which advised him of the settlement agreement. (R. 375-6). This was in February, 1940. (R. 383) The Board of Directors of the Authority called on Mr. Carmody shortly thereafter in an effort to obtain money to effect a settlement of the controversy. (R. 377-8) Mr. Carmody refused to advance any money for this purpose and suggested that the matter be adjusted in court before the spring floods came. (R. 381, also Government Exhibit 18, R. 380, 536.) Mr. Carmody wrote Governor Phillips, February 23, 1940, enclosing a copy of his letter to the Chairman of the Authority and directing the Governor's attention to the last paragraph of that letter, which suggests that the Authority should get an

agreement from the Governor and the Highway Commission or "ask the courts for relief." (R. 380, 536, 537, 538, Government Exhibits 18 and 19.) March 4, 1940, the Board of Directors adopted a resolution requesting the Administrator to give assurance that if the State agreed to litigate in the proper courts the liability of the Authority for inundating roads and bridges, the Administrator would make available and consent to the application of sufficient funds to pay any judgments, either by payment of money or through the construction by the Authority of re-located roads and bridges. (Government Exhibit 22, R. 381, 541.) On March 7, 1940, Mr. Carmody wrote the General Manager of the Authority acknowledging the resolution, reiterating his position and stating "the need for the earliest possible determination with respect to the facts of the agreement that has already been discussed too much in this kind of scattered fashion." (Government Exhibit 23, R. 381, 543.) The Authority did not institute any suit for the determination of the controversy.

Martial law.

March 13, 1940, the Governor issued an order declaring martial law. (Government Exhibit 1, R. 285, 401.) This order recites that damage will ensue upon the inundation of state roads and bridges upon the completion of the dam, declares martial law to exist in the area occupied by the dam, and directs the Adjutant General to occupy the military zone and to stop all work on the dam.

Upon issuance of the order declaring martial law the Governor personally gave the Adjutant General a "directive" to place the executive order in effect, if found necessary so to do to protect and prevent damage to the state property, including roads and bridges, and that the Adjutant General would cause the order declaring martial law to be executed only to the extent necessary to protect public

property. (R. 320, 321) This directive was given the Adjutant General orally and by him reduced to writing (R. 326) and read to the Governor (R. 328).

The order declaring martial law was signed the evening of March 13th. (R. 330) The Adjutant General ordered M Company and Col. Donnell on duty and placed Major Parris in command. (R. 331) He next saw M Company at the dam site on the 14th about eight o'clock in the morning. There were forty men in nine trucks. (R. 332) They did not get out of the trucks. The trucks were held there merely for the purpose of routing them home. They were there about twenty minutes. The Adjutant General told Major Parris to send the company home and it left immediately. (R. 333) No equipment, arms, or machine guns were taken out of the trucks. (R. 333) He then directed Major Parris to remain at the dam site until he was relieved and to observe the construction of the dam and the flow of the river. (R. 333) The Adjutant General did not issue any order to any of the men to interfere with the construction of this dam. (R. 334)

Major Parris arrived at the dam the evening of March 13th (R. 302), and according to the government's witness, I. N. Towne, construction superintendent for Massman Construction Company, stated that he had come to take charge under the proclamation of martial law and that his instructions were to see that the regular flow of the river was not interfered with in any way. (R. 303) Towne showed Major Parris six 8' x 10' openings at the bottom of the dam in arches 7 and 8 through which the river was then flowing (R. 304-305); told Parris he would like to finish the pour on arch 6, to which Parris consented and said he didn't wish to stop any work at that time but that no further pours were to be made and the six openings were not to be closed; that his orders with reference to arch 6 were tentative only

and Towne should await further orders from him the next day. (R. 305) Between eight and nine A. M. of the 14th, General Ledbetter and other officers called at Towne's office to see Major Parris and after that visit no further orders were given to Towne by the National Guard officers. (R. 305) Towne told them it didn't appear at that time he could close the six openings within a week or ten days. (R. 307) Major Parris, Captain Bliss and Lieutenant Shields remained three or four days. There were two officers on duty there until March 23, 1940. (R. 307) No member of the National Guard gave any further orders as to the closing or not closing the openings or with reference to pouring or not pouring arch 6. (R. 308) Between the time Towne heard of the restraining order issued by the state court and the time he heard of the restraining order issued in this case, three lifts of eleven feet each were made on arch 6. (R. 308-9) The arch was built to approximate elevation 700. (R. 309)

Arch 6 is probably the last arch to be finished. The contract requires closing March 29, 1940, and the penalty stated in the contract is \$500.00 per day, plus the cost of engineering expense of about \$250.00. (R. 309)

At the time Major Parris arrived there was no definite plan to close any of the six openings at the bottom of the dam and none of the work towards closing the openings was interfered with. (R. 310) There was no actual stoppage of work. (R. 311) All six openings in the dam were closed (R. 311) the night of March 22nd. (R. 312) It wasn't done until after the restraining order had been issued in the federal court but not on account of its having been issued. The National Guard did not in any way delay the closing of the six openings. (R. 313) and they were closed at the point of time planned to do it. (R. 313) When he arrived on March 13th, Major Parris told Towne to go ahead and make the pour just as usual. Towne did not refrain from doing any

work on account of the presence of the National Guard. (R. 315)

Of the six openings, five were permanently closed and one is a sluice gate. (R. 316) By the time of the trial (March 26, 1940), the orders given by the National Guard would have interfered with the work. (R. 317)

During the month of March, 1940, there was no insurrection against organized government in Mayes County (R. 297), the sheriff's posse was not appealed to to preserve order and peace around the dam site and none of the sheriff's subordinates were interfered with in the performance of their duties in enforcing the law in Mayes County. (R. 298) The sheriff and his deputies were enforcing the law in that county (R. 298) and the courts were open and functioning and the execution of their process was not interfered with. (R. 299) The sheriff didn't know whether he understood it was his duty to protect the roads and highways against inundation and overflow (R. 299-300), and didn't know that the highways and roads were about to be inundated by the Authority. He understood it was his duty to prevent people from closing roads unless they were authorized by the county commissioners or some superior state authority but had no information from any source that the Authority was about to inundate the highways. All the sheriff knew was what he read in the papers (R. 300).

State court suit.

About 3:30 P. M., March 13, 1940, Governor Phillips conferred with Attorney General Williamson. The Governor wanted a lawsuit brought. "It was my understanding in this discussion with the Governor that for reasons sufficient unto himself he thought he needed immediate restraint of action at the dam until such time at least as he could" bring the suit. * * * "about three of us worked the most of the night, and

the next morning two of the assistants in the office proceeded by car to Miami and the lawsuit was filed that next afternoon of the 14th of March." (R. 396)

March 14, 1940, there was filed in the District Court of Ottawa County, Oklahoma, a suit wherein the State of Oklahoma, *ex rel.*, Leon C. Phillips, Governor of the State of Oklahoma and the State Highway Commission of the State of Oklahoma was plaintiff, and Grand River Dam Authority, Ray McNaughton, H. Eichenberger, Earl Ward, R. P. Colley and M. Duncan as its directors, T. P. Clonts, its General Manager, W. R. Holway, its Consulting Engineer, and Massman Construction Company, were defendants. The petition sought an injunction against the inundation of state roads and bridges by closure of the dam, unless and until the damages caused thereby were paid to the State. (R. 180)

March 14, 1940, the State District Court issued a temporary restraining order against the defendants restraining them from closing arch No. 6 to any point above 700 feet elevation and from closing or shutting the six flood gates at the bottom of the dam until the further order of the court. (Complaint, Exhibit D, R. 178; Govt. Exhibit 13, R. 349.) This restraining order was served on Mr. McNaughton, chairman of the Authority's Board of Directors. (R. 392) I. N. Towne, Construction Superintendent for Massman Construction Company, had notice of this restraining order late in the afternoon of March 14th but was not served. (R. 308)

The application for temporary injunction in the State court was set for March 20, 1940. (R. 178)

March 19, 1940, the Government filed its complaint in the court below and on the same day that court issued a temporary restraining order (R. 203-207) restraining the defendants from proceeding in any way in the State court "except to cause to be vacated any restraining orders or in-

junctions granted in said suit and except to cause said suit to be dismissed or to be removed to this court; and * * * from taking any steps towards the enforcement of any such restraining order or injunction in said suit" (R. 204), restraining the use of any force, military or otherwise, or any process, judicial or otherwise, to interfere with the construction or closing of the Grand River Dam (R. 205).

On March 20, 1940, the Attorney General of the United States filed in the State court his suggestions of the lack of jurisdiction of that case and that the proceeding should be dismissed for want of jurisdiction. (Government Exhibit 13-A, R. 349, 527, 535.)

No further proceedings were had in the State court and at a hearing before a specially constituted court of three judges a preliminary injunction was issued in the court below (R. 262), continuing all the restraints and injunctions of the temporary restraining order issued upon the filing of the suit by the Government in the federal court.

In its bill of complaint herein, the United States charges (complaint, par. 28, R. 8) that the State court suit is not an adversary proceeding, is a friendly suit and not a genuine controversy, and is in effect a suit by the State against itself.

The chairman of the State Highway Commission had no conference and made no agreement with the defendants in the State court suit with reference to its filing. (R. 391) Ray McNaughton, chairman of the Authority's Board of Directors, had no agreement that the State court suit would be filed. (R. 392)

Mr. Mauzy: "We don't plead a collusion. We plead one part of the state is suing another part."

The Board of Directors of the Authority instructed its counsel to defend the case and did that in good faith. (R.

392-3) The Board instructed its counsel not to remove the case to the federal court.

The Court (Judge Williams): "That will support a finding of collusion. That is a greater reason, going and entering an appearance and then not removing it to the federal court." (R. 393)

McNaughton said the case was not a removable one so far as the Authority is concerned. McNaughton said he practices law a little.

The Court (Judge Williams): "I don't know about that. It might show what kind of a lawyer he is."

The Attorney General of the State of Oklahoma was instructed by the Governor to bring the State court suit. He never heard any suggestion of any agreement with the Authority, its directors or officers that the lawsuit was to be a friendly one and the defendants in that case knew nothing of the fact that it was to be filed. The Attorney General intended to have the State court suit prosecuted in good faith. (R. 394)

Assignment of Errors.

1. That said court erred in overruling the motion to dismiss filed on behalf of these defendants for the reasons set forth in said motion.

2. That said court erred in overruling the motions dictated into the Record on behalf of these defendants at the conclusion of the hearing on March 26, 1940, wherein the court was requested to deny the application of plaintiff for a temporary injunction.

3. That said court erred in overruling the motion of these defendants to vacate the restraining order and deny

the application of the plaintiff for an interlocutory injunction.

4. That said action is a suit against the State of Oklahoma, and the court had no jurisdiction of the subject-matter, and committed fundamental error in issuing said preliminary injunction.

5. That if Leon C. Phillips, in his declaration of martial law, exceeded his authority as Governor and his acts and those of the defendant Ledbetter as the Adjutant General were unlawful, yet nevertheless the State of Oklahoma on the relation of the Governor and the State Highway Commission had the lawful right to institute the State court action, and the court committed fundamental error in enjoining them from the further prosecution thereof.

6. That under the law the State of Oklahoma could prosecute said State court action on the relation of the State Highway Commission, and the prosecution of said action by said Commission was lawful, and the court committed fundamental error in restraining the individual members of said Commission from the further prosecution of said action, the action being dismissed by the plaintiff as against the State Highway Commission itself.

7. That if this action is not a suit against the State, and this court had jurisdiction for any purpose, it had no jurisdiction to enjoin the prosecution of the State court action, and it committed fundamental error in enjoining the further prosecution of said action.

8. That said court erred in holding as a matter of law that the State court action was in effect a suit against the United States.

9. That said court erred in its conclusions of law in

holding that the State court action was not an adversary one but was in effect collusively brought, because such a conclusion is contrary to the evidence and in conflict therewith, there being no evidence to support such a conclusion.

10. That the State of Oklahoma on the relation of the Governor and the State Highway Commission had the right to bring the State court action; that court had jurisdiction, and this court was without power or authority to enjoin the further prosecution of said action.

11. That under the allegations of the complaint of the plaintiff, this action was not a three-judge case, and this court mistakenly assumed to act as such, and said preliminary injunction is void and of no force and effect on that account.

12. That said court erred in denying the findings of fact and conclusions of law requested by these defendants.

13. That said court erred as to its findings of fact in that the court therein wholly overlooked and disregarded the right of the State of Oklahoma acting through these defendants as its officers to prevent the illegal inundation and destruction of its State highways and bridges.

14. That said court erred in the findings made by it in paragraphs 40, 42, 43, 50, 51, 52, 53, 61 and 64 of its findings of fact in that the same are not sustained by the evidence but are contrary thereto.

15. That said court erred in concluding in paragraph 16 of its conclusions of law that the Governor's use of military force to prevent State highways from being inundated and destroyed without compensation therefor was illegal and in violation of the due process clause of the Fourteenth Amendment.

16. That said court erred in concluding in paragraph 20 of its conclusions of law that the State court action would have been removable to the federal court if all the defendants thereto had joined in the removal.

17. That said court erred in concluding in paragraph 24 of its conclusions of law that no officer of the United States has the power to appear in the State court action to protect the interests of the United States. (See section 316, title 5, U. S. C. A.)

18. That the court erred in concluding in paragraph 30 of its conclusions of law that the action filed by the United States against these defendants is not a suit against the State of Oklahoma, but only against State officers acting illegally.

19. That the court erred in concluding in paragraph 32 of its conclusions of law that the Oklahoma statute, article 4, chapter 70, Oklahoma Session Laws 1935, does not require prepayment of compensation for the State highways to be inundated and destroyed as a condition precedent to overflowing or inundating said State highways.

20. That the court erred in concluding in paragraph 33 of its conclusions of law that the United States cannot intervene in the State court action to protect its interests.

21. That the court erred and abused its discretion in granting the preliminary injunction because of each of the matters set forth in the above assignments and for the reason that the evidence was wholly insufficient to authorize its issuance.

SUMMARY of ARGUMENT.

I.

Section 266 of the Judicial Code, requiring the hearing and determination by three judges of applications for certain interlocutory injunctions, is not applicable to this case. Therefore the three-judge trial court convened pursuant to section 266 was without jurisdiction to issue the interlocutory injunction and abused its discretion in doing so.

II.

The trial court's finding and conclusion that the State court suit was collusive and prosecuted in bad faith is unsupported by any evidence and disproved by uncontradicted evidence. The United States having invited this State court suit, the trial court abused its discretion in not denying for lack of equity the interlocutory injunction restraining further proceedings in the State court.

III.

This action is a suit against the State of Oklahoma, of which the Supreme Court has exclusive jurisdiction awarded in section 233 of the Judicial Code. Being without jurisdiction for this reason, the trial court abused its discretion in granting the interlocutory injunction.

IV.

The request for the interlocutory injunction to restrain further proceedings in the State court suit was inequitable, because section 265 of the Judicial Code prohibits the issuance of injunctions to stay proceedings in any State court except in bankruptcy. The trial court therefore abused its discretion in granting this injunction.

V.

There was no proof that the militia interfered in any way with the construction and completion of the dam or injured property or other rights of the United States, the uncontradicted evidence being to the contrary. The trial court abused its discretion in issuing the interlocutory injunction against the Governor and the Adjutant General of the State of Oklahoma enjoining the lawful use of the militia.

VI.

The suit in the State court was not a suit against the United States.

I.

Section 266 of the Judicial Code, requiring the hearing and determination by three judges of applications for certain interlocutory injunctions, is not applicable to this case. Therefore the three-judge trial court convened pursuant to section 266 was without jurisdiction to issue the interlocutory injunction and abused its discretion in doing so.

We here present the question, not of the jurisdiction of a federal court, but of the jurisdiction of a specially constituted three-judge court.

28 U. S. C. A. 380 (section 266, Judicial Code), so far as material, provides:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued * * * upon the ground of the unconstitutionality of such statute, unless the application

* * * shall be heard and determined by three judges
* * *

The question of jurisdiction must be determined by the allegations of the complaint.

—*Southern R. Co. v. Query*, (D. C.) 21 F. (2d) 333;
Modern Woodmen v. Casados, (D. C.) 15 F. Supp.
483;

Liberty, etc., Ins. Co. v. Read, (D. C.) 24 F. Supp.
103;

Joyner v. Browning, (D. C.) 30 F. Supp. 512.

Therefore the prerequisites to the jurisdiction of a three-judge court to be shown by the complaint, are that an injunction is sought to restrain the enforcement or execution of (1) a state statute or (2) an order of an administrative board or commission acting under or pursuant to a state statute, and (3) the injunction must be sought upon the ground of the unconstitutionality of the statute or of the order issued pursuant to statute.

None of these prerequisites exists in the case at bar.

No state statute involved.

There is no allegation in the Government's complaint as to the unconstitutionality of any state statute; or that the state court suit was filed or the proclamation of martial law was issued pursuant to any statute; or that any statute does or does not authorize what was done; or that any statute as applied by any state officer is unconstitutional.

The complaint, by failure to attack them, admits the constitutionality of any statutes under which the officers acted. The most that can be said is that the injunction below was sought on the ground that the result of the order declaring martial law was unconstitutional. That does not make a case for a three-judge court.

In *Ex parte Bransford*, 310 U. S. 354, 358, 361, this court said:

"Section 266 lays down as one of the requirements for a three-judge court that the injunction against the officer of the state to restrain the enforcement, operation or execution of the state statute must be sought 'upon the ground of the unconstitutionality of such statute.'

"In so far as it is alleged that the assessments are void because unauthorized by the Arizona Statute, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as tested by the federal constitution. * * *

"It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the District Court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction. Where by an omission to attack the constitutionality of a state statute, its validity is admitted for the purposes of the bill, a determination by the trial court that the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill."

So, in *Grigsby v. Harris*, (D. C. Tex.) 27 F. (2d) 945, as to this point, it was said:

"Plaintiffs at no point in their petition attack any statute of the state of Texas as unconstitutional, but, on the contrary, confine their action to attacking a rule issued by the state Democratic executive committee,

which rule the petition declared to be in violation of the plaintiffs' constitutional rights, the petition going on to allege that the state Democratic executive committee acted under color of a state statute, 'which in itself does not authorize such restriction'."

See, also:

L. & N. R. Co. v. Garrett, 231 U. S. 298;

In the Matter of the Application of Wm. Buder,
271 U. S. 461;

Lykins v. Chesapeake & O. R. Co., (C. C. A. 6) 209
Fed. 573;

Council of Defense v. International Magazine Co.,
(C. C. A. 8) 267 Fed. 390;

Michigan State Tel. Co. v. Odell, (D. C. Mich.) 283
Fed. 139.

The jurisdiction of the three-judge court cannot be sustained on the ground that injunction was sought to restrain the enforcement or execution of a state statute upon the ground of the unconstitutionality thereof, for the complaint makes no attack upon any state statute, either upon the ground of its constitutionality or otherwise.

***As to order of administrative
board or commission.***

A three-judge court has jurisdiction to restrain enforcement or execution of an order only if the order is made (1) by an administrative board or commission, (2) under or pursuant to a state statute, and (3) is attacked upon the ground of its unconstitutionality. (Sec. 266, *supra*.) This is not such a case.

We submit that, in view of the history of section 266, an order declaring martial law is not "an order made by an administrative board or commission" within the purview of the statute.

Mr. Clayton, who had charge of the bill in the House, stated that the purpose of the amendment including the quoted language was "to put the order of a state railroad commission upon an equality with a statute of a state; in other words, to give the same force and effect to the order of a state railroad commission as is accorded under existing law to a state statute." 49 Cong. Rec. 4773, cited in *Ex parte Williams*, 277 U. S. 267, 273.

Both before and after the amendment including "orders", the section applied to orders made by a board exercising delegated legislative authority, the orders being "of the same force as if made by the legislature; and so * * * a law of the state."

—*Grand Trunk Western R. Co. v. R. R. Com.*, 221 U. S. 400, 403;

Okla. Nat. Gas Co. v. Russell, 261 U. S. 290.

Section 266 covers cases brought to test the constitutionality of legislative action. The Governor is not a board or commission. In any event, he is not an administrative board or commission. In issuing a proclamation of martial law and enforcing it he exercises executive, not legislative power.

—*Franks v. Smith*, 142 Ky. 232, 134 S. W. 484;

Powers Merc. Co. v. Olson, (D. C.) 7 F. Supp. 865.

In *Green v. Hart*, (D. C. Conn.) 41 F. (2d) 854, the court refused to convene a specially constituted court in an action to restrain officers from acting under a state game statute because *inter alia*, "neither are the respondents Hart and McCue, as police officers, and Woods, as prosecuting attorney * * * severally or collectively, an administrative board or commission * * *."

It is said that the three-judge procedure was "designed

for a specific class of cases, sharply defined” and “should not be lightly extended.”

—*Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 391.

Settled rules of statutory construction require the exclusion from section 266 of a Governor's proclamation of martial law. The natural and usual signification of plain terms is to be adopted as the legislative meaning, the language is to be taken in its ordinary sense,

—*Columbia Water Power Co. v. Columbia Elec. St., etc., Co.*, 172 U. S. 475;

United States v. First Natl. Bank, 234 U. S. 245;

Danciger v. Cooley, 248 U. S. 319;

Old Colony T. Co. v. Commissioner of Int. Revenue, 301 U. S. 379;

the court may not add to or alter plain words,

—*Matson Nav. Co. v. United States*, 284 U. S. 352;

United States v. Hill, 248 U. S. 420;

and where no ambiguity exists, there is no room for construction.

—*United States v. Missouri Pac. R. Co.*, 278 U. S. 269;

Helvering v. City Bank Farmers Trust Co., 296 U. S. 85;

Osaka Shoshen Kaisha Line v. United States, 300 U. S. 98.

There is no need to labor the proposition further. We think the meaning of the words “an order made by an administrative board or commission” is plain, and cannot be said to include a governor's proclamation of martial law.

Section 266 authorizes injunction against the enforcement of “an order made by an administrative board or commission acting under and pursuant to the statutes of such

state." Even if the Governor is an "administrative board or commission" (we believe he is not) the bill of complaint states no claim for relief under section 266 because it does not allege that the order was made pursuant to any statute of the State of Oklahoma. That the order may result in the unconstitutional taking of property is not enough. See *Ex parte Bransford*, *supra*, 310 U. S. 354.

The case at bar presents none of the essential elements requisite to confer on a three-judge court jurisdiction to enjoin enforcement of an administrative order, and the court below was without jurisdiction to issue the interlocutory injunction.

***Sterling v. Constantin*
discussed and distinguished.**

To sustain its jurisdiction, the court below relied on *Sterling v. Constantin*, 287 U. S. 378, 393, 394, and *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (Conclusion 34, R. 261). The *Sterling* case or section 266, or both, have been construed by two other courts to vest jurisdiction in a three-judge court where a governor's proclamation of martial law was involved. See *Cox v. McNutt*, 12 F. Supp. 355; *Powers Merc. Co. v. Olson*, 7 F. Supp. 865. Cf. *Joyner v. Browning*, 30 F. Supp. 512.

It would be highly presumptuous for us to tell this court what it meant by its opinion in the *Sterling* case. That will not be done. We deem it permissible to state our understanding of the opinion. As we understand it, the *Sterling* case is not controlling here because:

1. In the *Sterling* case the pleadings raised the question of the constitutional invalidity of the constitution and statutes of the State of Texas under which the Governor assumed to act and the case decided that question. (287 U. S. 388-389, 393.) There is no such issue in the case at bar.

The effect of failure to raise such an issue has already been discussed and shown to be fatal to jurisdiction under section 266.

2. In the *Sterling* case the Governor sought to use the militia to enforce an order of the State Railroad Commission after the enforcement of that order had been restrained by a federal court of competent jurisdiction (287 U. S. 397, 398, 402). That is not true of the case at bar. The militia was called out March 13th, the state court suit for protection of the State's rights was filed March 14th, and the case at bar was filed March 19th.

3. Neither the *Sterling* case nor any of the District Court cases cited consider the question as to whether a Governor's proclamation of martial law is "an order made by an administrative board or commission" within the purview of section 266. Therefore none of the cases should be considered as having decided the question merely because it existed in the record and might have been raised and decided.

—*United States v. Mitchell*, 271 U. S. 9, 14;

Ex parte Public Nat. Bank, 278 U. S. 101, 105.

**Section 266 inapplicable where
order affects only particular
district and is of limited scope.**

The proclamation of martial law was not general or state-wide in scope. It was effective only in an area of a few acres. It concerned only a particular project or improvement—the Grand River Dam. Section 266 was not intended to, and does not, cover such a situation.

—*Rorick v. Board of Commissioners of Everglades
Drainage District*, 307 U. S. 208;

Ex parte Collins, 277 U. S. 565;

Ex parte Public Natl. Bk., 278 U. S. 101;

Borges v. Loftis, (C. C. A. 9) 87 F. (2d) 734.

Conclusion.

We respectfully submit that this case is not one cognizable by a specially constituted court of three judges convened under the provisions of 28 U. S. C. A., Sec. 380, and that the court below was without jurisdiction to issue the interlocutory injunction.

This court, upon determining the lack of jurisdiction of the trial court, will retain jurisdiction for the purpose of reversing the order granting the interlocutory injunction and will remand the case for further proceedings to be taken independently of 28 U. S. C. A. 380.

—*Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*,
292 U. S. 386;

International Ladies' Garment Workers Union v.
Donnelly Garment Co., 304 U. S. 243;

William Jameson & Co. v. Morgenthau, 307 U. S.
171;

Rorick v. Board of Commissioners, etc., 307 U. S.
208.

II.

The trial court's finding and conclusion that the state court suit was collusive and prosecuted in bad faith is unsupported by any evidence and disproved by uncontradicted evidence. The United States having invited this state court suit, the trial court abused its discretion in not denying for lack of equity the interlocutory injunction restraining further proceedings in the State court.

The trial court concluded that the Authority instructed its counsel not to remove the State court suit to the federal court (No. 19, R. 259) that the suit was removable (No. 20, R. 259) and also,

"21. The State court suit being one affecting the property interests of the United States, and being subject to removal it does not follow that the conclusion

should be made that there was good faith and no collusion." (R. 260)

Yet Government counsel had said at the trial:

"We don't plead a collusion. We plead one part of the state is suing another part." (R. 392, lines 29-30.)

Whereupon the court (Judge Williams) said:

"That is right. But if they are going to do that that would make it a greater reason why the federal court should take jurisdiction. If two branches of the State government, when the issues would effect the bond holders, get together and agree you file it in the State court, that by itself would justify a finding of collusion." (R. 392, lines 31-37.)

And again, after evidence was introduced that the Authority instructed its counsel not to remove the case, the court said:

"That will support a finding of collusion. That is a greater reason, going and entering an appearance and then not removing it to the federal court." (R. 392, lines 11-14.)

McNaughton thought the case was not removable. (R. 393, lines 17-18) We do not argue the question of removability.⁽¹⁾ As we have shown, an actual controversy existed. That the parties preferred to litigate in one of two courts of concurrent jurisdiction was neither wrongful nor collusive. Deliberate choice of a forum is not fraud.

—*Blair v. Chicago*, 201 U. S. 400, 448;

Matter of Reisenberg, 208 U. S. 90, 111;

Black and White Taxicab, etc., Co. v. Brown and Yellow Taxicab and Tfr. Co., 276 U. S. 518, 524 and 525;

Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183.

(1) See, *G. R. D. A. v. Going*, 29 F. Supp. 316; Cf. *U. S. v. Appalachian Electric Power Co.*, (C. C. A. 4) 107 F. (2d) 769, cert. gtd. 309 U. S. 646.

Further, we confidently assert that there is not a scintilla of evidence in this record of any agreement between plaintiffs and defendants regarding the State court suit. On the contrary, the undisputed evidence is that there was no such agreement, that the suit was filed without defendants' knowledge, and that it was intended to be prosecuted in good faith. (Singleton, R. 391, lines 18-26; McNaughton, R. 392, lines 21-24; Williamson, R. 394, lines 29-37.)

Again, a suit is not collusive merely because a corporation plaintiff owns control of the corporation defendant, or because the two corporations have an identical executive officer.

—*City of Toledo v. Toledo Rys. & Light Co.*, (C. C. A. 6) 259 Fed. 450, 455, 456;

Quinlivan v. Dail-Overland Company, (C. C. A. 6) 274 Fed. 56.

With all due respect to the trial court we submit that, in the face of the Government's assertion that there was no issue of collusion, and in the teeth of the uncontradicted evidence referred to above, as well as the settled law on the subject, the trial court grossly abused its discretion in making its Conclusions 19, 20 and 21.

But that is not all.

***Government invited state court suit
and cannot be heard to attack it.***

The Government's position concerning the State court suit is, we believe, a peculiar and indefensible one.

The Government's financial interests in the project had been represented by Mr. Carmody. He suggested that the Authority and the State get their controversy over the road settlement "adjusted quickly in court before the spring floods came. *That was my own notion of the matter.*" (R. 381, lines 25-28) He wrote McNaughton February 23, 1940,

and twice mentioned that the matter should be taken to court. (Govt. Ex. 18, R. 537, lines 9, 31,) *He sent a copy of that letter to the Governor* (Govt. Ex. 18; R. 537, 5th line from bottom of page) *and wrote a letter of transmittal to the Governor, specifically calling attention to the suggestion for litigation.* (R. 538, lines 16-24.)

The Authority then adopted a resolution asking the administrator (Mr. Carmody) to make available funds to pay any judgment to be rendered in such a proceeding (R. 541, last paragraph)⁽¹⁾ and on March 7, 1940, Mr. Carmody reasserted his position of not advancing funds and "the need for the earliest possible determination" of the controversy. (Govt. Ex. 23, R. 543.) The State court suit was filed March 14, 1940.

Mr. Carmody, the Government's representative, originated the idea of and insisted on a suit between the Authority and the State or its Highway Commission to settle the controversy, yet *upon such a suit being filed, the Government immediately attacks it because one part of the State is suing another—the very thing Mr. Carmody advocated.*

Surely Mr. Carmody intended that the suit he suggested be an actual controversy, prosecuted in good faith, with each party asserting all rights and remedies available to it. What he complains of, apparently, is the resulting temporary restraining order.

(1) The indenture securing the Authority's bonds provides for a construction fund to pay the cost of the project, including "the cost of the relocation or removal of highways * * * and other structures." (Sec. 4.03 (a), R. 38.) Of a total authorized bond issue of \$12,500,000.00 only \$11,563,000.00 in bonds had been issued. Mr. Carmody, as Administrator, and the United States had absolute control of all expenditures made by the Authority. Paragraphs Third (f) and (g) of offer (R. 104a); Grant and Bond Payments, Part II, par. 6 (R. 113); waiver (R. 136); resolution accepting offer, par. Third (c), (f), (g), (h) (R. 151-2); bond indenture, Secs. 4.03 (R. 38), 4.05, subpar. 6 (1); (2) (R. 42), 4.06 (R. 45); Art. V (R. 52); Art. VIII (R. 63).

One who has invoked action by State courts or authorities may not later, when dissatisfied with the result, assail their action. Suitors may not invoke the extraordinary powers of equity to relieve them from the very action they have invoked and encouraged, because the result of that action was such as was not contemplated.

—*United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300.

Curiously enough, the Government's complaint contains no offer to do equity. "He who comes into equity must come with clean hands." "He who seeks equity must do equity."

Upon this state of the record, the request for a preliminary injunction should have been denied for lack of equity.

III.

This action is a suit against the State of Oklahoma, of which the Supreme Court has exclusive jurisdiction awarded in section 233 of the Judicial Code. Being without jurisdiction for this reason, the trial court abused its discretion in granting the interlocutory injunction.

Statutes.

28 U. S. C. A. 341 (Sec. 233, Judicial Code), provides:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party * * *."

28 U. S. C. A. 41 (1) (section 24, Judicial Code), provides that District Courts shall have original jurisdiction,

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States * * *."

If this is a suit against the State of Oklahoma, the lower court had no jurisdiction, exclusive jurisdiction being vested

in the Supreme Court, unless section 41 (1) is a later statute in conflict with and superseding section 341. See *United States v. California*, 297 U. S. 175.

Section 233 was originally enacted as the thirteenth section of the Judiciary Act of 1789, became section 687 of the Revised Statutes and was carried into the Judicial Code in 1911 (36 Stat. at L. 1156, Chap. 231). (*United States v. California*, *supra*).

Sections 9 and 11 of the Judiciary Act of 1789 became section 629, Subds. second and third of the Revised Statutes, and conferred upon Circuit Courts jurisdiction

“Of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners.”

“Of all suits at common law where the United States * * * are plaintiffs.”

The Act of March 3, 1875, (18 Stat. 470) as amended and carried into the Judicial Code as section 24 in 1911, and now (further amended) appearing as 28 U. S. C. A. 41 (1) is but an amendment of sections 9 and 11 of the Judiciary Act of 1789, and is not a later statute than 28 U. S. C. A. 341, and does not conflict with or supersede it.

That this court has exclusive jurisdiction of a suit by the United States against a state, and the District Court has none, is clear.

—*United States v. Texas*, 143 U. S. 621.

**Officers' authority as
to State court suit.**

The power of the State to take action to preserve its highways and keep them open and unobstructed is not only

implicit (Cf. *Re Debs*, 158 U. S. 564) but is explicit, and appears from the statutory law of the State.⁽¹⁾

The State Highway Department is provided for by the Oklahoma Constitution (Art. XVI, Sec. 1) and has general supervision of the highways of the State.

The state court petition (R. 180) states a case that the officers of the State had authority to institute and prosecute to preserve and maintain state roads and bridges.

The Governor has authority to sue in the name of the State.

—*State, ex rel., v. Huston*, 21 Okl. 782, 97 Pac. 982.

The Attorney General of the State of Oklahoma, having been requested by the Governor so to do, had authority to file and prosecute the state court suit. This included the right to determine the remedy to be sought.

—Sec. 3532, Okla. Stat. 1931;⁽²⁾

Sec. 10085, Okla. Stat. 1931;⁽³⁾

State v. Huston, supra, 21 Okl. 782, 97 Pac. 982;

Ex parte Kelly, 45 Okl. 577, 146 Pac. 444.

(1)Sec. 10349, Okla. Stat. 1931: "Any person or persons who shall willfully or knowingly obstruct or damage any public road by * * * turning water upon such road * * *" shall be guilty of a misdemeanor.

Sec. 11489, Okla. Stat. 1931: "A nuisance consists in unlawfully doing an act * * * which * * * Third. Unlawfully interferes with, obstructs or tends to obstruct * * * any * * * street or highway."

Secs. 11496 and 11501, Okla. Stat. 1931, provide that a nuisance may give rise to a civil action, or, may be abated.

Sec. 2327, Okla. Stat. 1931: "Every person who maliciously * * * injures or destroys any public highway or bridge * * * is guilty of a felony."

(2)Sec. 3532, Okla. Stat. 1931: "The Attorney General shall * * * when requested by the Governor * * * appear for the State and prosecute * * * in any * * * court * * * in any cause or manner * * * in which the State may be a party or interested."

(3)Sec. 10085, Okla. Stat. 1931 (concerning Highway Commission): "When directed by the Governor or requested by the Commission in writing, the Attorney General shall * * * appear for and assist the Commission in any proceedings in any of the courts of the State in which the State is a party."

The remedy of injunction prayed for in the state court suit was proper. The Supreme Court of Oklahoma holds that injunction lies where private property is being taken for public purposes before first paying compensation therefor,

—*Watkins v. Board of Commissioners of Stephens County*, 70 Okl. 305, 174 Pac. 523;

or to prevent the establishment or continuance of a nuisance,

—*Town of Rush Springs v. Bentley*, 75 Okl. 119, 182 Pac. 664;

Town of Jennings v. Pappenfuss, 129 Okl. 85, 263 Pac. 456;

such as the obstruction of a highway.

—*Thomas v. Farrier*, 179 Okl. 263, 65 P. (2d) 526.

The Government contends, however, that the filing of the state court suit was in excess of the state officers' authority because: *First*, the Authority had express power to inundate roads and bridges and the State's only remedy was to receive payment from the Authority's revenues, subject to the prior lien of the United States (Secs. 2 (h) and 9, Session Laws Okla. 1935, Ch. 70, Art. 4); and *Second*, the Authority agreed to and did build a bridge in discharge of its obligation to the State, so the State in fact had no claim (complaint, paragraphs 18-19, R. 5-6; see Appendix I for act creating Authority).

We note, parenthetically, that it is an odd ground for an injunction that the suit to be enjoined may turn out against the party sued (*Northport Power & Light Co. v. Hartley, Governor*, 283 U. S. 568), and "it is fundamental that a bill for injunction merely alleging that a suit is to be or has been brought upon an invalid claim does not state a case for injunction." (*Allen v. American Fidelity & Casualty Co.*, (C. C. A. 5) 80 F. (2d) 458.)

We consider the first ground.

It was and is the State's position that the Authority must pay for the roads and bridges before it destroyed them. The court below construed sections 2 (h) and 9, *supra*, in line with the Government's contention and against that of the State (Conclusions 32, 33, 35, 36, R. 261-262) and found the State officers were not "justified" in obtaining the state court restraining order (Conclusion 33, R. 261).

The issue is not so easily determined. A state officer does not exceed his authority merely because he institutes litigation to which there may be a successful defense. To make his action wrongful, the claim must palpably be so frivolous that its assertion amounts to manifest oppression.

—*Hawks v. Hamill*, 288 U. S. 52, 60, 61, 62.

Grounds for state court suit.

We do not propose to try the state court suit here. As was done in *Hawks v. Hamill*, *supra*, "We do no more than emphasize the complexities of law as well as of policy" involved in the case in the state court. Here are some of them:

1. Considering the fact that the Authority had mortgaged its revenues to pay \$11,563,000.00 in bonds, plus interest, the last bond maturing in 1972; that it may execute further mortgages; that since only net revenues are available, as expense of operation must be paid, there is no certainty that any revenues will ever be available to pay the State's claim of nearly \$900,000.00; and that a judgment for damages cannot be satisfied by levy on the Authority's property (Chap. 70, Art. 4, Sec. 14, S. L. Okla. 1935), section 9, if applicable, results in authorizing a taking without payment at any time, and so contravenes article V, section 53, of the Oklahoma Constitution that, "The Legislature shall have no

power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liabilities or obligations of any corporation, or individual, to this State * * * ”

2. The public policy of the State of Oklahoma, disclosed by her constitution, statutes and court decisions, is that prior payment is a condition precedent to exercise of the right to take or condemn property, whether publicly or privately owned, and whether the taker be a private individual, the State, or an agency or department of the State. Article 2, sections 23, 24, Oklahoma Constitution; Okla. Stat. sections 11931, 11932, concerning eminent domain by railroads; the provisions as to railroads being applicable to all corporations having the right of eminent domain, and to the State, state institutions and departments. (*Idem.*, Sec. 11935, 10049 to 10052, incl., Ch. 50, Art. 12, Sec. 2, Okla. S. L. 1937.) This law applies where state-owned property is to be taken (Okla. Stat. 1931, Sec. 10046) and *after* an award is made, the condemnor “shall have the right to occupy such” state-owned property by paying into the state treasury the amount of the award, or if an appeal is taken, the right to occupy may be had upon giving a bond, with sureties, for treble the amount of the award. (*Idem.*, Sec. 10047.) Under the general conservation district law, no property may be taken until compensation has been paid. (*Idem.*, Sec. 13283.) See Appendix II for text of statutes herein referred to.

Section 9 should be construed, not by itself, but in the light of the policy disclosed by these constitutional and statutory provisions, and in harmony with them.

—*Watkins v. Board of Commissioners of Stephens County*, 70 Okl. 305, 174 Pac. 523 (not involving act creating the Authority).

Generally, see:

Stinchcomb v. Okla. City, 81 Okl. 250, 198 Pac. 508.

3. Section 9 is not applicable to payment of damages for taking of property without the owner's consent. Section 2 (p) of the act applies. It provides that "said District shall be liable for all damages caused. * * * in creating, constructing, maintaining or operating said District to any corporation, partnership, person or individual whose property * * * has been damaged and said damages may be determined by appropriate action in the same manner provided by law under the conservancy act * * *." As we have shown, the general conservancy act, in dealing with assessment of damages for taking of property, provides that no property shall be taken "until compensation * * * has been paid, according to law." (Okla. Stat. 1931, Sec. 13283.)

Section 9 deals with contract obligations, or relationships voluntarily entered into. The language of section 9 shows this, particularly if the rule of *ejusdem generis* be applied to the words "whether arising from contract, implied contract, or otherwise." Section 2 (p) applies to obligations of the Authority arising from involuntary relationships, such as taking or damaging property without the owner's consent. So construed, the provisions of the act are harmonious and effect is given to every part thereof, as required by an elementary rule of statutory construction. If not so construed, section 2 (p) is meaningless.

4. Admitting, *arguendo*, the applicability of the rule prevailing in some jurisdictions, that property may be taken for public use before payment therefor, the state court petition states a case within the exception to the rule. (Par. 6, R. 182) The exception is that if the taker is insolvent; or if, being a governmental agency, no appropriation has been made to provide funds, or there is doubt as to the sufficiency of the appropriation to pay the damages, or if payment is to be made out of a particular fund, which may or may not prove sufficient, injunction lies to prohibit the taking. 18

Am. Jur., pp. 949, 950, "Eminent Domain;" Sec. 304; 20 C. J., p. 1167, Sec. 528; *Ryan v. C. B. & Q. R. Co.*, (C. C. A. 7) 59 F. (2d) 137.

5. Under a familiar doctrine, section 9 does not apply to liabilities or obligations to the State of Oklahoma, since the State is not named in, and so is not bound by, the section.

6. Section 9 was not validly enacted, because its provisions are not mentioned in the title of the act, particularly in so far as taking and paying for State property are concerned.

It is respectfully submitted that the propositions above stated have substance and certainly are neither so palpably frivolous nor so obviously without merit that the officers of the State were guilty of manifest oppression or of acting wrongfully in asserting them, or filing a suit which could be supported by them. It follows that they acted within their lawful authority in filing the State court suit and obtaining the temporary injunction.

—*Hawks v. Hamill, supra.*

We turn to the second ground of the Government's attack.

***As to agreement
discharging liability.***

The complaint in the case at bar pleads the Authority's right to flood public property under section 2 (h), *supra*, and that the Authority's liability in damages was to pay solely out of revenues of the project (complaint, Par. 18, R. 5) that a question arose as to the Authority's obligation to pay for roads; *on information and belief* that the Authority and the State Highway Commission agreed that if the Authority would build a certain bridge, the State would accept it in full payment of the Authority's obligation; that the bridge was built and the Authority has discharged all liability arising

ing out of flooding the roads (Par. 19, R. 5-6); that a further controversy arose as to the Authority's obligation and the Governor threatened to prevent completion of the project unless the Authority made provision to pay for roads above the statutory provisions for the source and time for payment, and said threats were part of a scheme to exact payments from the United States. (Par. 20, R. 6) Then follow allegations that martial law was declared and the State court suit filed in pursuance of that scheme. (Pars. 21 to 28, R. 6-9)

What we have said above answers in large part the charge of an attempt by State officers to obtain payment "above the statutory provisions for the source and time of payment" for roads and bridges.

Let us consider the record as to the balance of the charge.

There is no evidence of any threat by Governor Phillips. On the contrary, Mr. Carmody, who gave the only evidence of any conversations with the Governor, said:

"We talked about these roads and the amount of money that would be required to replace the roads, and I gathered from him that it was his understanding that there had been no agreement about these roads * * * he suggested I refer the matter to my General Counsel * * *. It was his view he would advise me as a matter of law we were required to produce this money." (R. 376, top of page.)

And again

"I am not conscious he made any specific request. He may even have named an amount, but as I say, most of my business is listening to people asking for money, and it doesn't make a very great impression on me. The thing that did impress me was that he talked about having this determined as a matter of fact and as a matter of law. I think in fairness to him I ought to say,

in my office he made no threats; he was as much of a gentleman as anybody who ever came to my office." (R. 376) (Emphasis ours.)

Nevertheless, the trial court made a finding that the "threats" were made. (Findings 42, 43, R. 252)

Note that Exhibit 22, if it can be construed as evidence of any unlawful threat (we think it cannot), was introduced only against the defendants Clonts and the Authority, Government counsel stating "It is obviously not admissible against the Governor." (R. 381)

Then, when the questions turned to the agreement about building the bridge in settlement of the State's claim, Government counsel said:

"And I may say, I didn't propose at this hearing to go into the merits of that question at all, because I don't conceive it to be within the issues being heard here this afternoon." (R. 377)

And later:

Mr. Dudley (defendants' counsel): "I understood counsel to say just now he is not going to present the question whether there was a contract between the Authority and the Highway Commission."

Mr. Weiner (governments' counsel): "Not at this hearing because I don't think it is within the issues." (R. 378, below middle of page.)

The court so understood the matter.

The Court (Judge Kennamer): "I am asking, was the agreement in fact made?"

Mr. Davidson: Yes, sir.

Mr. Dudley: I don't know who he is making that statement on behalf of.

The Court (Judge Williams): That is not in issue. We understand that." (R. 387)

We respectfully submit that right there the Government's case went out the window. The whole theory of the Government's bill, as we read it, is that the Authority had in fact discharged its liability to the State and owed it nothing; and in endeavoring to enforce a non-existent liability, the State officers acted in excess of their lawful authority, and were not representing the State. Yet the very issue of the existence of the agreement relied on as discharging the liability was withdrawn from the consideration of the court.

In addition, the Government's own evidence showed that an actual controversy existed over the question of liability and settlement for roads, and it was finally so stipulated. (R. 389, 390)

In the face of all this, the trial court stated the Authority's contention about the agreement and found that,

"said bridge was built and completed pursuant to said agreement by said Authority at a cost of \$369,083."
(Finding 40, R. 251-2)

Such a finding, supported by evidence, might have strengthened the Government's case, but there was no such evidence.

The fact that Mr. Carmody was asked to make funds available shows no wrongful intent because, as we have shown, he and the Government furnished the Authority all its money and absolutely controlled all expenditures by the Authority.

A plan or "scheme" by State officers to recover for the State what is due it, or believed to be due it, is not wrongful, even though the debtor denies liability, or claims that he has paid the claim.

***This is a suit
against the State.***

The State of Oklahoma was not a party to the record in the case at bar, but every officer of the State who could prosecute the state court suit was, individually and in his official capacity, a party defendant in this case. The case was dismissed as to the Highway Commission, but not as to its individual members. The direct and immediate result of the order below was to restrain the State of Oklahoma—the only party in interest in the state court suit—the only party whose interests were affected by the interlocutory injunction issued by the trial court. This is a suit against the State of Oklahoma.

—*In re Ayers*, 123 U. S. 443;

Reagan v. Farmers Loan & T. Co., 154 U. S. 362;

Missouri v. Fiske, 290 U. S. 18;

Wyoming v. Utah Const. Co., 278 U. S. 194;

Wentz v. Potter, 167 Okl. 154, 28 P. (2d) 562;

Potter v. State Highway Commission, 184 Okl. 171,
86 P. (2d) 293.

The Government must have realized that it was suing the State. It dismissed the case as to the Highway Commission, but not as to the individuals comprising the Commission, and took its injunction against them, with other defendants. That the dismissal was ineffective as an escape from suing the State is obvious.

If any doubt remains that this is a suit against the State, we invite attention to the trial court's conclusions adjudicating the rights of the State, and of the other parties litigant against the State. (Conclusions 32, 35, 36, R. 261-262.)

It follows that the trial court had no jurisdiction of this case in so far as an injunction against the state court

suit was concerned. Having no jurisdiction, it abused its discretion in granting the interlocutory injunction against the State Court suit.

—*United States v. Corrick*, 298 U. S. 435.

IV.

The request for the interlocutory injunction to restrain further proceedings in the State court suit was inequitable because section 265 of the Judicial Code prohibits the issuance of injunctions to stay proceedings in any State court except in bankruptcy. The trial court therefore abused its discretion in granting this injunction.

Section 265 of the Judicial Code (28 U. S. C. A. 379) provides:

“The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

This section was enacted to prevent needless friction between state and federal courts and applies to restraint of the parties without any formal restraint upon the state court as such.

—*Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U. S. 4.

And all orders which have the effect of restraining the state court suit are prohibited.

—*Harrison v. Triplex Gold Mines, Ltd.*, (C. C. A. 1) 33 F. (2d) 667;

Essanay Film Mfg. Co. v. Kane, 258 U. S. 358.

The court below concluded that section 265 does not apply where the United States is the party plaintiff and hence

that section was no bar to granting the interlocutory injunction. (Conclusion 29, R. 260.) It relied on:

United States v. Inaba, (D. C.) 291 Fed. 416;
United States v. McIntosh, (D. C.) 57 F. (2d) 573;
United States v. Babcock, (D. C.) 6 F. (2d) 160;
Babcock v. United States, (C. C. A. 7) 9 F. (2d) 905.

The two *Babcock* cases clearly are not authority here. In them a state court had authorized a contract for a drainage ditch to be cut across a federal highway. The court was exercising legislative or administrative functions—was not acting judicially. The proceedings in the state court were not within the purview of section 265. The Circuit Court of Appeals recognized this in sustaining the injunction on the sole authority of *Public Service Co. v. Corboy*, 250 U. S. 153.

In *United States v. McIntosh*, *supra*, 57 F. (2d) 573, an ejectment suit in a state court against officers of the United States who were in possession of a Marine Corps post was enjoined. Virginia had ceded to the United States jurisdiction over these lands.

In *United States v. Inaba*, (D. C.) 291 Fed. 416, injunction issued to restrain a state court receiver from disposing of the proceeds of crops in a suit by lien claimants, the United States having leased the land of an Indian (the United States holding title as trustee) and having reserved in the lease a lien on the crops.

In both the *McIntosh* and *Inaba* cases it was said the United States may not be sued without its consent; that there was no way in which the United States could intervene in a state court, that exclusive jurisdiction of suits by the United States was vested in the federal courts, the state court could not determine the rights of the United States,

and therefore the United States would be powerless to protect its rights if section 265 be held to apply. The conclusion was that section 265 is inapplicable to suits brought by the United States. (Compare complaint, par. 30, R. 9.)

The conclusion is erroneous, because it is based on false premises—falsity established by the decisions of this court, and the decisions of other courts following them.

That there is a lack of jurisdiction in the State court creates no exception to the prohibition of section 265, even where the State court suit involves property in which a mortgagee, plaintiff in the federal court, but not a party in the State court, claims an interest or right of possession.

—*Kohn v. Central Distributing Co.*, 306 U. S. 531.

And see:

Carl Laemmle Music Co. v. Stern, (D. C.) 209 Fed. 129.

Furthermore, the federal courts are not vested with exclusive jurisdiction of suits involving the rights and property of the United States. State courts also have jurisdiction. And the United States may, and in many cases must, appear or intervene in a State court to protect its rights, interests or property that may be involved in or affected by such suit to which it is not a party.

—5 U. S. C. A., Sec. 316;

Merryweather v. United States, (C. C. A. 9) 12 F. (2d) 407;

New York v. New Jersey, 256 U. S. 296, 307-308;

United States v. Bank of N. Y. & Trust Co., 296 U. S. 463;

Pioneer Irr. Dist. v. American Ditch Assn., 50 Idaho 732, 1 P. (2d) 196;

Ponzi v. Fessenden, 258 U. S. 254.

5 U. S. C. A., Sec. 316, provides:

“The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States. (R. S. #367.)”

It is therefore apparent that the conclusion in the *McIntosh* and *Inaba* cases rests upon an erroneous foundation and that the cases must be rejected as unsound. They cannot stand in the face of this court's opinion and the statute cited.

Even if sound, the conclusion in the *McIntosh* and *Inaba* cases would have to be rejected here. In those cases the United States was powerless to protect its rights in the state court proceedings, the federal courts reasoned. As will be shown there was no evidence that the Authority would not have protected the rights of the United States, its sole bondholder, in the state court suit brought against it and others by the State of Oklahoma on the relation of the Governor and State Highway Commission.

In any event, the United States could have protected its rights in this State court suit by having The First National Bank of Miami, trustee under the indenture securing all bonds issued by the Authority, intervene therein. Under both the act of the Oklahoma legislature creating the G. R. D. A. and the trust indenture, this trustee has and possesses all powers “incident to the general representation of the bondholders in the enforcement of their right(s).” ⁽¹⁾

To render section 265 applicable here requires a holding that when the United States comes into court it brings

(1) Par. 5, Sec. 10, Ch. 70, Art. 4, S. L. Okla. 1935; Trust Indenture, Art. 10, Sec. 10.05, R. 78.

with its special equities not enjoyed by other litigants, is entitled to rights and remedies not available to private parties, and that the power of the court is enlarged because the Sovereign is plaintiff. The whole body of federal jurisprudence is against such a holding. We refer to only a few of the many cases on this point.

In *Shooters Island Shipyard Co. v. Standard Shipbuilding Corporation*, (C. C. A. 3) 293 Fed. 706, 715, it is said:

“ * * * it is well settled that when the United States appears as a suitor it voluntarily submits to the law, places itself upon the same footing with other litigants, and is not entitled to remedies which cannot be granted to individuals (*United States v. Beebe*, (C. C.) 17 Fed. 36; *United States v. Barker*, 12 Wheat. 559, 6 L. ed. 728; *United States v. Ingate*, (C. C.) 48 Fed. 251, 253; *United States v. Bank*, 96 U. S. 30, 24 L. ed. 647; *Lynch v. United States*, 13 Okl. 142, 73 Pac. 1095; *Brent v. Bank*, 10 Pet. 596, 9 L. ed. 547; *Chesapeake & Delaware Canal Co. v. United States*, 250 U. S. 123, 126, 39 Sup. Ct. 407, 63 L. ed. 889; *Pond v. United States*, 111 Fed. 989, 995, 49 C. C. A. 582). ”

In *Brent v. Bank of Washington*, 10 Pet. 596, 614, this court said:

“ Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in *The United States v. Mitchell*, 9 Peters 743, have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. 2 Co. Inst. 573; 2 Ves. Sen. 296, 297; Hard. 60, 460. This principle is also carried into all the statutes, by which the appropriate courts

are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject. 7 Co. 19; 6 Hard. 27, 170, 230, 502; 4 Co. Inst. 190."

See, also:

United States v. National City Bank of N. Y. (C. C. A. 2) 83 F. (2d) 236, cert. den., 299 U. S. 563;

Kandle v. United States, (C. C. A. 3) 4 F. (2d) 183;
Luckenbach S. S. Co. v. Norwegian Barque Thekla, 266 U. S. 328.

At least three cases indicate section 265 applies to suits brought by the United States.

In *United States v. Land Title Bank & Trust Co.*, (C. C. A. 3) 90 F. (2d) 970, the United States purchased a lot for a post office site. Abutting owners sued the Government's contractor in a state court to enjoin the building of a wall on the site. The United States then sued in the federal court to enjoin the prosecution of the state court suit. The trial court refused the injunction because of section 265. The Circuit Court of Appeals affirmed.

In *United States v. Parkhurst-Davis Mercantile Company*, 176 U. S. 317, the United States sought an injunction against the prosecution of a state court suit against two Indians, and enforcement of the claims against their lands in Kansas. Upon its being admitted that the lands were within the jurisdiction of the state court, and that the Indians were subject to state laws, the court denied the injunction because of the prohibition of section 720, Revised Statutes (now Sec. 265, Judicial Code).

In *United States v. Central Stockholders' Corporation of Vallejo*, (C. C. A. 9) 52 F. (2d) 322, it appears that riparian owners had sued in a state court to enjoin the Govern-

ment's licensee from impounding waters having their sources in the public domain, the permittee not having paid compensation. The United States filed suit in federal court to enjoin the state court suit. Injunction was refused. Section 265 was not discussed, but the case is important in connection with the Government's claims in the case at bar based on the issuance of a permit or license to the Authority by the Federal Power Commission.

We submit that the *Babcock*, *McIntosh* and *Inaba* cases cannot be accepted as authority; that in the case at bar the State court had jurisdiction to determine the rights of the United States; that the United States could have appeared in the State court to protect its rights or property; that the United States was not helpless unless it could obtain a federal court injunction; that the United States is not entitled to rights or remedies not available to private litigants and the fact that the Government is plaintiff gives rise to no special equities in its favor and does not enlarge the equitable powers of the court. The purpose of section 265—to prevent conflict between state and federal courts—is as much thwarted by issuance of an injunction where the United States is plaintiff as where a private party is plaintiff.

All else aside, section 265 applies to this suit by the United States. Where Government funds are expended through the instrumentality of a corporation (the Authority is a corporation) the Congress has given unconditional consent to suits of every character against the corporation (Point VI, *infra*) and that consent necessarily implies a waiver of the Government's immunity from suit and of the necessity of making the Government a party. No other department of the Government should have the power to revoke that consent, or to make it ineffective. Yet that will be accomplished if section 265 is held not applicable here because the United States is plaintiff.

We respectfully submit that section 265 applies in the case at bar, and that the trial court was guilty of an abuse of discretion in not refusing the interlocutory injunction because of the prohibition of that section.

V.

There was no proof that the militia interfered in any way with the construction and completion of the dam or injured property or other rights of the United States, the uncontradicted evidence being to the contrary. The trial court abused its discretion in issuing the interlocutory injunction against the Governor and the Adjutant General of the State of Oklahoma enjoining the lawful use of the militia.

Under the Constitution of Oklahoma, the Governor may call out the militia for any one of four purposes, namely, "to execute the laws, protect the public health, suppress insurrection, and repel invasion."⁽¹⁾ The power to call out the militia to enforce the laws is patently not limited to cases where insurrection also exists, the public health also needs protection, and an invasion should be repelled. The four purposes are separate.

Further, the Governor's power to call out the militia is not dependent upon a prior request from local peace officers; nor must the militia, when called out, be placed under the control of the civil authorities.

—*Franks v. Smith*, 142 Ky. 232, 134 S. W. 484;
Ex parte McDonald, 49 Mont. 454, 143 Pac. 947;
Seaney v. State, ... Miss. ..., 194 So. 913;

(1) Art. VI, Sec. 6, Okla. Constitution: "The Governor shall be Commander-in-Chief of the militia of the State * * * and may call out the same to execute the laws, protect the public health, suppress insurrection, and repel invasion."

Art. VI, Sec. 8, *Idem.*: "The Governor shall cause the laws of the State to be faithfully executed."

Middleton v. Denhardt, 261 Ky. 134, 87 S. W. (2d) 139.

So, also, the Governor may order the militia into service to investigate and determine whether or not the law is being violated.

—*Begley v. Louisville Times Co., Inc.*, 272 Ky. 805, 115 S. W. (2d) 345.

It follows that the trial court's findings that there was no insurrection, that the local peace officers were performing their duties without interference, and that the courts were open (Findings 52, 53, 54, R. 254), are pointless, and have no bearing upon the existence of the Governor's right to exercise his power to call out the militia. The order declaring martial law does not recite the existence of any state of insurrection, helplessness of local officers or inability of the courts to function. (R. 401) (In *Sterling v. Constantin*, the order falsely recited existence of an insurrection.)

And finally, the Governor's determination that an emergency had arisen which justified calling out the militia to execute the laws is conclusive, and is not subject to review by any court. The jurisdiction of the courts is confined to a determination of whether or not, after the militia is called into service, it does any act which unconstitutionally deprives owners of their property.

—*Russell Petroleum Co. v. Walker*, 162 Okl. 216, 19 P. (2d) 582;

Sterling v. Constantin, 287 U. S. 378, 399;

Powers Merc. Co. v. Olson, (a three-judge case) 7 F. Supp. 865.

We therefore consider what the militia did to effect any taking of property.

At the time the order was issued, the Governor gave a directive to the Adjutant General to make the order effective.

tive only in so far as necessary to protect state property.
(R. 320-321)

A full statement of the facts with reference to what was actually done by the National Guard under the proclamation of martial law and the directive appears at pp. 6-9, *supra*, under the heading "Martial Law" and is here incorporated by reference. The entire situation is summarized by I. N. Towne, Construction Superintendent for Massman Construction Company, and the Government's own witness:

Q. "Did the National Guard in any way delay you in closing the six openings? (At the bottom of the dam.)

A. No, sir.

Q. Or were those openings closed then at the point of time—

A. As we planned to do it, yes, sir.

Q. As you planned to do it?

A. Yes, sir. (R. 313)

Q. ** did the Massman Construction Company refrain from doing any work in connection with the completion of this dam on account of any order or on account of the presence of any National Guardsmen, or did the work go on just as usual although they were present?

A. There was no actual stoppage of work, but it was a hindrance to our plans on account of the fact that we had a restraining order from the State court to go no higher than elevation 700 with arch 6.

Q. That was on account of the State (court) order?

A. That is right.

Q. I didn't ask you about that, I asked you if you refrained from doing any work on account of the presence of the National Guard being there.

A. No, sir." (R. 315)

It may be conceded that had the Governor called out the militia to enforce his order, and stopped there, work

on the dam might eventually have been interfered with, and it might have been said that the Governor had sought to displace the civil laws by military law, and had sought to make his executive fiat supreme, without any right to appeal to the courts, and that such a course of conduct might have been within the condemnation of *Sterling v. Constantin*.

The facts here are otherwise.

On the same day he issued the order declaring martial law (March 13, 1940), the Governor instructed the Attorney General of the State to bring suit to protect the State's rights. That suit was brought within twenty-four hours. As we have shown, any person who had any property rights in the dam could have obtained an adjudication thereof in the State court. Had it been shown that work on the dam should not be stopped, or that stopping it took anyone's property, it must be presumed that the State court would have made a proper order by way of denying a temporary injunction, or otherwise. And it must be presumed that the Governor would have acted lawfully, and would not, through use of the militia, attempt to defy the order of the very court whose jurisdiction he had invoked. Certain it is that after the State court restraining order was issued, the military gave no orders with reference to work on the dam, and the officers who were at the dam were there as military observers. (Findings 47, 48, 49, R. 253)

We submit that the facts, which are undisputed, do not show arbitrary, unwarranted action by the Governor, and affirmatively disclose that there was no taking of property through the use of the militia. This record shows that the Governor proceeded in a lawful and orderly manner to protect the property of the State.

The interlocutory injunction, as to martial law, was improvidently issued and the findings and conclusions of the trial court with reference thereto are erroneous.

VI.

The suit in the State court was not a suit against the United States.

Even if it be assumed that the Authority is an agency of the United States because the Authority held a license from the Federal Power Commission and because the United States had made the grant and loan to the Authority, it does not follow that the State court suit was a suit against the United States.

In the State court the State of Oklahoma sued to protect its roads and bridges, of the stated value of approximately \$889,000.00, from destruction by the wrongful acts of the Authority. The principles governing such a case are stated by (then) Mr. Justice HUGHES in *Philadelphia Company v. Stimson*, 223 U. S. 605, 619 (a suit for injunction against the Secretary of War):

“If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.” (Citing cases.)

“And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. * * * The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.”

See also:

Goltra v. Weeks, 271 U. S. 536;

Ickes v. Fox, 300 U. S. 82, 96.

Specifically a suit to enjoin Government officers from proceeding with a condemnation proceeding and construction

of a dam on the ground of lack of authority was held not to be a suit against the United States so as to require consent.

—*Ryan v. Chicago, B. & Q. R. Co.*, (C. C. A. 7) 59 F. (2d) 137.

Furthermore the Authority is a corporation, organized under the laws of Oklahoma, with power to sue and to be sued and to engage in business. Where the United States chooses to use such a corporate agency it consents that the corporation may be sued, and the consent extends to suits for tort as well as for contract. This rule applies where the United States is sole stockholder. Therefore sole owner—of the corporation and *a fortiori* applies where the United States is a creditor only as in the case at bar.

—*Sloan Shipyards Corpn. v. U. S. Shipping Board Emergency Fleet Corpn.*, 258 U. S. 549;

Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381.

Thus it is held that such a corporation and not the United States is the real party in interest as to property owned by such a corporation notwithstanding the fact that the United States subscribed for the whole of the authorized capital stock.

—*Providence Engineering Corpn. v. Downey Shipbuilding Corpn.*, (C. C. A. 2) 294 Fed. 641.

And a federal agency with power to sue and be sued is subject to garnishment.

—*Federal Housing Administration v. Burr*, 309 U. S. 242, 251.

The United States is not the owner of any of the Authority's stock. It does not own the dam. It does not, and in law cannot, have any lien upon the tangible property of the Authority. (Sess. Laws 1935, p. 357, Sec. 14.)

It could have sold its bonds to any person. Those bonds are secured only by the net income of the Authority and the bonds were purchased by the United States for sale to investors. (R. 290-291) It is apparent then that the argument that the suit in the State court was a suit against the United States comes to this: That an action to enjoin a debtor from committing a wrongful act is a suit, not only against the debtor, but against his creditors also. It goes further; that in every case where the United States has lent money, upon security, to a corporation, that corporation may not be enjoined from wrongful acts because the suit for injunction is a suit against the United States and affects its property. The argument thus stated carries its own refutation.

Whether or not the suit in the State court was against the United States and whether or not that court had jurisdiction were questions for it to decide and furnished no ground for the issuance of the interlocutory injunction granted by the court below.

In *Kohn v. Central Distributing Co.*, 306 U. S. 531, the Commonwealth of Kentucky sued in a State court to recover a tax from the Central Distributing Company. A writ of attachment was issued and levied upon whiskey, which Kohn claimed was subject to a mortgage in his favor and he claimed the mortgage was in default and that he had taken possession of the property. The constitutional validity of the State statute was attacked. This court affirmed the lower court in dismissing the bill even though foreclosure of the mortgage was also sought and to the assertion that the State court was without jurisdiction of the attachment suit replied, "but that question, appropriately one for the decision of the State court, could manifestly be presented and determined in that action." This court further said that the injunction against the State court proceeding was

prohibited by section 265 of the Judicial Code and the Act of August 21, 1937 (50 Stat. L. 738, Chap. 726).

Conclusion.

This case is not within the jurisdiction of a three-judge court; the District Court is prohibited from issuing an injunction against the state court suit by reason of the provisions of section 265, Judicial Code; this is a suit against the State of Oklahoma, and the court below was without jurisdiction thereof; and there was no unlawful use of the militia by the Governor of the State of Oklahoma.

The order granting the interlocutory injunction should be vacated and the District Court should be directed to dismiss the complaint.

Respectfully submitted,

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Appendices.

APPENDIX I.

Chapter 70, Article 4, Session Laws of Oklahoma, 1935.

"Article 4.

GRAND RIVER DAM AUTHORITY.

Sebate Bill No. 395.

"AN ACT creating a Conservation and Reclamation District to be known as Grand River Dam Authority in accordance with and by the authority set forth in Section 31, of Article 2, of the Constitution of the State of Oklahoma, and to be a governmental agency, body politic and corporate, without power to mortgage or incumber any of its property or to alienate any of its property necessary to its business, or to levy taxes or assessments or to create any indebtedness payable out of taxes or assessments, or to pledge the credit of the State; fixing the boundaries thereof; conferring thereon certain powers, rights, privileges, and functions, including the power to control, store, preserve, use, distribute and sell the water of the Grand River and its tributaries; to develop, generate, distribute, and sell water power and electric energy, to acquire property by condemnation or otherwise, to construct; maintain, use and operate facilities, to make contracts, to borrow money, to create and issue its negotiable bonds for cash, property, or refunding purposes on stated terms and conditions, and in connection therewith to pledge all or any part of its revenues; vesting the powers of the District in a Board of Directors and prescribing the manner of their appointment and their duties; providing for the appointment of officers and their qualifications, agents, and employees; providing for the fiscal management of the district; preserving existing water rights to the extent provided; prescribing all necessary details providing that if any provision of this Act shall be held to be

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invalid, the validity of the other provisions thereof shall not be affected.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. *Grand River Dam Authority.*

There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as 'Grand River Dam Authority' (hereinafter called the District), and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Nowata, Ottawa, Rogers, Tulsa, Wagoner, Sequoyah, Osage, Washington, McIntosh, Creek and Okmulgee. Such District shall be, and is hereby, declared to be a governmental agency and body politic and corporate, with the powers of government and with the authority to exercise the rights, privileges, and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation and development of the forest, water and hydro-electric power of the State of Oklahoma.

(a) Nothing in this Act or in any other Act or law contained, however, shall be construed as authorizing the District to levy or collect taxes or assessments, or to create any indebtedness payable out of taxes or assessments, or in any manner to pledge the credit of the State of Oklahoma, or any sub-division thereof.

(b) Nothing in this Act shall be construed as authorizing the District, and it shall not be authorized, to build distributing lines or to engage in the retail marketing of the hydro-electric power developed. *Provided further* that the hydro-electric power can be sold at the turbines for wholesale purposes only, and then only to distributing concerns; *provided*, that no such concern shall be connected, in any way, with or controlled, or owned by the District.

SECTION 2. *Powers, Rights and Privileges.*

The District shall have and is hereby authorized to exercise the following powers, rights and privileges:

(a) To control, store and preserve, within the boundaries of the District, the water of the Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;

(b) To develop and generate water power and electric energy within the boundaries of the District;

(c) To prevent or aid in the prevention of damage to person or property from the waters of the Grand River and its tributaries;

(d) To forest and reforest and to aid in the foresting and reforesting of the water shed area of the Grand River and its tributaries and to prevent and to aid in the prevention of soil erosion and floods within said water shed area;

(e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate any and all property of any kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the District, necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act;

(f) To acquire by condemnation any and all property of any kind, real, personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation;

(g) Subject to the provision of this Act from time to time sell or otherwise dispose of any property of any kind, real, personal, or mixed, or any interest therein, which shall not be necessary to the carrying on of the business of the District;

(h) To overflow and inundate any public lands and public property and to require the relocation of roads and highways in the manner and to the extent necessary to carry out the purposes of this Act: *Provided*, that said District

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shall be liable in damages to the State of Oklahoma and/or any subdivision thereof for any injury occasioned or expense incurred by reason thereof.

(i) To construct, extend, improve, maintain, and reconstruct, to cause to be constructed, extended, improved, maintained and reconstructed and to use and operate any and all facilities of any kind necessary or convenient to the exercise of such powers, rights, privileges and functions;

(j) To sue and be sued in its corporate name;

(k) To adopt, use and alter a corporate seal;

(l) To make by-laws for the management and regulation of its affairs;

(m) To appoint officers, agents, and employees, to prescribe their duties and to fix their compensation;

(n) To make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act;

(o) To borrow money for its corporate purposes and, without limitation of the generality of the foregoing to borrow, money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to make and issue its negotiable bonds for moneys borrowed, in the manner and to the extent provided in Section 10. Nothing in this Act shall authorize the issuance of any bonds, notes or other evidences of indebtedness of the District, except as specifically provided in this Act, and no issuance of bonds, notes or other evidences of indebtedness of the District, except as specifically provided in this Act, shall ever be authorized except by an Act of the Legislature;

(p) To do any and all other acts, or things necessary or convenient to the exercise of the powers, rights, privileges or functions conferred upon it by this Act or any other Act or law. *Provided* said District shall be liable for all damage caused by said District, its agents, servants and

employees in creating, constructing, maintaining or operating said District to any corporation, partnership, person or individual whose property, either real or personal, within or without said District, has been damaged and said damages may be determined by appropriate action in the same manner as provided by law under the conservancy act of the State of Oklahoma.

Provided, however, that in the course of exercising its powers as herein enumerated the said District shall at all times consider the rights and needs of the people living within and upon the land lying within the water shed of the Grand River and its tributaries above the District; *Provided, however,* that nothing herein shall prevent the District from selling for irrigation purposes within the boundaries of the District any water impounded by it under authority of law, *provided* that nothing herein contained shall authorize the State to engage in agriculture except for Educational and Scientific purposes and for the support of its penal, charitable and educational institutions.

SECTION 3. Board of Directors.

The powers, rights, privileges and functions of the District shall be exercised by a Board of nine directors (herein called the Board), all of whom shall be residents of and free hold property tax payers in the District; *provided* that not more than one of such directors shall be residents of the same county. Three of the directors shall be appointed by the Governor, three by the Attorney General, and three by the Commissioner of Labor of the State of Oklahoma. *Provided*, that no person shall be eligible for such appointment if he has, during the preceding three years before his appointment been employed by an electric power and light company, gas company, telephone company, or any other utility company of any kind or character whatsoever; *Provided further* that no person holding a federal, state, county, city or town office, elective or appointive, shall be eligible to serve as a member of the Board of Directors on the above named Grand River Dam Authority. And *providing further* that such directors shall have lived in said District 5 years prior to his appointment. Of the three Directors

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first appointed by each authority, one shall be appointed for a term expiring January 1st, 1937, one for a term expiring January 1st, 1939, and one for a period expiring January 1st, 1941. At the expiration of the term of any Director another Director shall be appointed by the same authority which appointed the Director whose term has expired. Each Director shall hold office until the expiration of the term for which he was appointed and thereafter until his successor shall have been appointed and qualified unless sooner removed as in this Act provided. Any director may be removed by the Authority which appointed him for inefficiency, neglect of duty, or misconduct in office, after at least ten days' written notice of the charges against him and an opportunity to be heard in person or by counsel at public hearing conducted before the three authorities above named. A vacancy resulting from a death, resignation, or removal of any Director shall be filled by the authority which appointed him, for the unexpired term of such Director. Each Director shall qualify by taking the official oath of office prescribed by general statute. Each Director shall receive a fee of \$10.00 per day for each day spent in attending meetings of the Board, and no other fee or salary.

Until the adoption of by-laws fixing the time and place of regular meetings and the manner in which special meetings may be called, meetings of the Board shall be held at such times and places as five of the Directors may designate in writing. Five Directors shall constitute a quorum at any meeting and, except as otherwise provided in this Act or in the by-laws all action may be taken by the affirmative vote of a majority of the Directors present at any such meeting, except that no contracts would involve an amount greater than \$10,000.00 or which is to run for a longer period (*sic*) of a year and no bonds, notes, or other evidence of indebtedness and no amendment of the by-laws shall be valid unless authorized or ratified by the affirmative vote of at least five Directors.

SECTION 4. *Secretary—Records—General Manager—Treasurer—Employees.*

The Board shall select a secretary who shall keep true and complete records of all proceedings of the Board. Un-

til the appointment of a secretary, or in the event of his absence or inability to act, a secretary *pro tem* shall be selected by the Board. The Board shall also select a general manager, who shall be the chief executive officer of the District, and a treasurer, who may also hold the office of Secretary. All such officers shall have such powers and duties, shall hold office for such term and be subject to removal in such manner as may be provided in the (*sic*) compensation of such officers. The Board may appoint such officers, agents, and employees, fix their compensation and term of office and the method by which they may be removed, and delegate to them such of its power and duties as it may deem proper.

SECTION 5. *Fiscal Management.*

The monies of the District shall be disbursed only on checks, drafts, orders, or other instruments signed by such persons as shall be authorized to sign the same by the by-laws or resolution concurred in by not less than five directors. The general manager, the treasurer and all other officers, agents, and employees of the District who shall be charged with the collection, custody or payment of any funds of the District shall give bond conditioned on the faithful performance of their duties and an accounting for all funds and property of the District coming into their respective hands, each of which bonds shall be in form and amount and with a surety (which shall be a surety company authorized to do business in the State of Oklahoma), approved by the Board, and the premiums on such bonds shall be paid by the District and charged as an operating expense.

SECTION 6. *Domicile of District—Accounts and Records.*

The domicile of the District shall be in the City of Vinita, County of Craig, where the District shall maintain its principal office, in charge of its general manager, until otherwise designated by the affirmative vote of five Directors. The District shall cause to be kept complete and accurate accounts conforming to approved methods of book-keeping. Said accounts and all contracts, documents, and records of the District shall be kept at said principal office.

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Said accounts and contracts shall be open to public inspection at all reasonable times. The Board shall cause to be made and completed within ninety days after the end of each calendar year, an audit of the books of account and financial records of the District for such calendar year, such audit to be made by an independent certified public accountant or firm of certified public accountants. Copies of a written report of such audit, certified to by said accountant or accountants, shall be placed and kept on file with the State Conservation Commission, with the Treasurer of the State of Oklahoma and at said principal office, and shall be open to public inspection at all reasonable times.

SECTION 7. *Officers or Employees—Interest in Contracts Prohibited.*

No director, officer, agent, or employee of the District shall be directly or indirectly interested in any contract for the purchase of any property or construction of any work by or for the District, and if any such person shall be or become so interested in any such contract, he shall be guilty of a felony and on conviction thereof shall be subject to a fine in an amount not exceeding Ten Thousand (\$10,000.00) Dollars or to confinement in the county jail for not less than one year nor more than ten years, or both.

SECTION 8. *Rates and Charges—Fees.*

The Board shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate:

(a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

(b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

(c) To pay all sinking fund and/or reserve fund payments agreed to be made in respect of any such bonds, and

payable out of such revenues, when and as the same shall become due and payable; and

(d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d) above, the Board shall establish a reasonable depreciation and emergency fund, and retire (by purchase and cancellation or redemption) bonds issued under this Act, or apply the same to any corporate purpose. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act.

Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, *provided*, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c) and (d) of this Section 8, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged.

SECTION 9. *Discharge of Liabilities—Bonds.*

Any and every indebtedness, liability, or obligation of the District, for the payment of money, however entered into or incurred, and whether arising from contract, implied contract, or otherwise, shall be payable solely (1) out of the revenues received by the District in respect of its prop-

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erties, subject to any prior lien thereon conferred by any resolution or resolutions theretofore adopted as in this Act provided, authorizing the issuance of bonds or (2) if the Board shall so determine, out of the proceeds of sale by the District of bonds payable solely from such revenues.

SECTION 10. *Bond Issue Authorized—Actions on Bonds.*

The District shall have power and is hereby authorized to issue from time to time, bonds as herein authorized, for any corporate purpose, not to exceed Fifteen Million (\$15,000,000) Dollars in aggregate principal amount. Any additional amount of bonds must be authorized by an Act of the Legislature. Such bonds may either be (1) sold for cash, at public or private sale, at such price or prices as the Board shall determine, provided that the interest cost of the money received therefor, computed to maturity in accordance with standard bond tables in general use by banks and insurance companies, shall not exceed six per centum per annum, or (2) may be issued on such terms as the Board shall determine in exchange for property of any kind, real, personal, or mixed, or any interest therein which the Board shall deem necessary or convenient for any such corporate purpose, or (3) may be issued in exchange for like principal amounts of other obligations of the District, matured or unmatured. The proceeds of sale of such bonds shall be deposited in such bank or banks or trust company or trust companies, and shall be paid out pursuant to such terms and conditions, as may be agreed upon between the District and the purchasers of such bonds. All such bonds shall be authorized by resolution or resolutions of the Board concurred in by at least five of the members thereof, and shall bear such date or dates, mature at such time or times, bear interest at such rate or rates (not exceeding six per centum (6%) per annum) payable annually or semi-annually, be in such denominations (*sic*), be in such form, either coupon or registered, carry such registration privileges as to principal only or as to both principal and interest, and as to exchange of coupon bonds for registered bonds or vice versa, and exchange of bonds of one denomination for bonds of other denominations, be executed in such

manner and be payable at such place or places within or without the State of Oklahoma, as such resolution or resolutions may provide. Any resolution or resolutions authorizing any bonds may contain provisions, which shall be part of the contract between the District and the holders thereof from time to time (a) reserving the right to redeem such bonds at such time or times in such amounts and at such prices, not exceeding one hundred and five per centum of the principal amount thereof, plus accrued interest, as may be provided, (b) providing for the setting aside of sinking funds or reserve funds and the regulation and disposition thereof, (c) pledging to secure the payment of the principal of and interest on such bonds and of the sinking fund or reserve fund payments agreed to be made in respect of such bonds all or any part of the gross or net revenues thereafter received by the District in respect of the property, real, personal, or mixed; to be acquired and/or constructed with such bonds or the proceeds thereof, or all or any part of the gross or net revenues thereafter received by the District from whatever source derived, (d) prescribing the purposes to which such bonds or any bonds thereafter to be issued, or the proceeds thereof, may be applied, (e) agreeing to fix and collect rates and charges sufficient to produce revenues adequate to pay the items specified in Subdivisions (a), (b), (c) and (d) of Section 8 hereof, and prescribing the use and disposition of all revenues, (f) prescribing limitations upon the issuance of additional bonds and upon the agreements which may be made with the purchasers and successive holders thereof, (g) with regard to the construction, extension, improvement, reconstruction, operation, maintenance and repair of the properties of the District and carrying of insurance upon all or any part of said properties covering loss or damage or loss of use and occupancy resulting from specified risks, (h) fixing the procedure, if any, by which, if the District shall so desire, the terms of any contract with the holders of such bonds may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given, (i) for the execution and delivery by the District to a bank or trust company authorized by

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law to accept trusts, or to the United States of America or any officer or agency thereof, of indentures and agreements for the benefit of the holders of such bonds setting forth any or all of the agreements herein authorized to be made with or from the benefit of the holders of such bonds and such other provisions as may be customary in such indentures or agreements; and (j) such other provisions, not inconsistent with the provisions of the Act, as the Board may approve.

Any such resolution and any indenture or agreement entered into pursuant thereto may provide that in the event that (a) Default shall be made in the payment of the interest on any or all bonds when and as the same shall become due and payable, or (b) Default shall be made in the payment of the principal of any or all bonds when and as the same shall become due and payable, whether at the maturity thereof, by call for redemption or otherwise, or (c) Default shall be made in the performance of any agreement made with the purchasers or successive holders of any bonds, and such default shall have continued such period, if any, as may be prescribed by said resolution in respect thereof, the trustee under the indenture or indentures entered into in respect of the bonds authorized thereby, or, if there shall be no such indenture, a trustee appointed in the manner provided in such resolution or resolutions by the holders of twenty-five per centum in aggregate principal amount of the bonds authorized thereby and at the time outstanding may, and upon the written request of the holders of twenty-five per centum in aggregate principal amount of the bonds authorized by such resolution or resolutions at the time outstanding, shall, in his or its own name, but for the equal and proportionate benefit of the holders of all of such bonds, and with or without having possession thereof;

(1) By mandamus or other suit, action or proceeding at law or in equity, enforce all rights of the holders of such bonds,

(2) Bring suit upon such bonds and/or the appurtenant coupons,

(3) By action or suit in equity, require the District to

account as if it were the trustee of an express trust for the bondholders,

(4) By action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such bonds, and/or,

(5) After such notice to the District as such resolution may provide, declare the principal of all of such bonds due and payable, and if all defaults shall have been made good, then with the written consent of the holder or holders of twenty-five per centum in aggregate principal amount of such bonds at the time outstanding, annul such declaration and its consequence; *provided, however*, that the holders of more than a majority in principal amount of the bonds authorized thereby and at the time outstanding by instrument or instruments in writing delivered to such trustee have the right to direct and control any and all action taken or to be taken by such trustee under this paragraph. Any such resolution, indenture or agreement may provide that in any such suit, action, or proceeding, any such trustee, whether or not all of such bonds shall have been declared due and payable, and with or without possession of any thereof, shall be entitled as of right to the appointment of a receiver who may enter and take possession of all or any part of the properties of the District and operate and maintain the same, and fix, collect and receive rates and charges sufficient to provide revenues adequate to pay the items set forth in subparagraphs (a), (b), (c) and (d), of Section 8 hereof, and the costs and disbursements of such suit, action, or proceeding, and to apply such revenues in conformity with the provisions of this Act and the resolution or resolutions authorizing such bonds. In any suit, action, or proceeding by any such trustee, the reasonable fees, counsel fees and expenses of such trustee and of the receiver or receivers, if any, shall constitute taxable disbursements and all costs and disbursements, (*sic*) and all costs and disbursements allowed by the court shall be a first charge upon any revenues pledged to secure the payment of such bonds. Subject to the provisions of the Constitution of the State of Oklahoma, the courts of the County of Craig, or other county wherein the domicile may be situated, shall have jurisdiction of any such suit, action,

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or proceeding by any such trustee on behalf of the bondholders and of all property involved therein. In addition to the powers hereinabove specifically provided for, each such trustee shall have and possess all powers necessary or appropriate for the exercise of any thereof, or incident to the general representation of the bondholders in the enforcement of their right.

Before any bonds shall be sold by the District, a certified copy of the proceedings for the issuance thereof, including the form of such bonds, together with any other information which the Attorney General of the State of Oklahoma may require, and shall be submitted to the Attorney General, and if he shall find that such bonds have been issued in accordance with law, and if he shall approve such bonds, he shall execute a certificate to that effect which shall be filed in the office of the Auditor of the State of Oklahoma and be recorded in a record kept of (sic) that purpose. No bonds shall be issued until the same shall have been registered by the Auditor, who shall so register the same if the Attorney General shall have filed with the Auditor his certificate approving the bonds and the proceedings for the issuance thereof as hereinabove provided. All bonds approved by the Attorney General as aforesaid, and registered by the Auditor as aforesaid, and issued in accordance with the proceedings so approved shall be valid and binding obligations of the District and shall be incontestable for any cause from and after the time of such registration.

SECTION 11. *Bonds Negotiable Instruments.*

All bonds issued by the District pursuant to the provisions of this Act shall constitute negotiable instrument within the meaning of The Negotiable Instruments Law.

SECTION 12. *Contracts With Federal Agencies.*

The District may, but without intending by this provision to limit any powers of the District as granted to it by this Act, enter into and carry out such contract, or establish or comply with such rules and regulations concerning labor and materials and other related matters in connection with any project or projects as the District may deem de-

sirable or as may be requested by the United States of America, or any corporation or agency created, designated or established thereby, which may assist in the financing of any such project or projects. The District shall have the authority to request engineering aid of the Corps of Engineers of the United States Army, the Federal Power Commission, or any other Federal agency, in the designing and construction of any project authorized under the terms of this Act and to use such aid, if and when offered, and to pay any reasonable cost therefor.

SECTION 13. *District May Purchase Bonds.*

The District shall have power out of any funds available therefor to purchase any bonds issued by it at a price not exceeding the redemption price applicable at the time of such purchase, or if such bonds shall not be redeemable, at a price not exceeding the principal amount thereof plus accrued interest. All bonds so purchased shall be cancelled and no bonds shall ever be issued in lieu thereof.

SECTION 14. *Encumbrances Prohibited.*

Nothing in this Act shall be construed as authorizing the District and it shall not be authorized to mortgage or otherwise encumber any of its property of any kind, real, personal, or mixed, or any interest therein, or to acquire any such property or interest subject to a mortgage or conditional sale, *provided* that this section shall not be construed as preventing the pledging of the revenues of the District as herein authorized. Nothing in this Act shall be construed as authorizing the sale, lease, or other disposition of any such property or interest of the District by the District, or any receiver of any of its properties or through any court proceeding or otherwise, *provided, however*, that the District may sell for cash any such property or interest in an aggregate value not exceeding the sum of Fifty Thousand (\$50,000.00) Dollars in any one year if the Board, by the affirmative vote of six of the members thereof shall have determined that the same is not necessary or convenient to the business of the District and shall have approved the terms of any such sale, it being the intention of this Act that except by sale as in this section expressly author-

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ized, no such property or interest shall ever come into the ownership or control, directly or indirectly, of any person, firm, or corporation other than a public authority created under the laws of the State of Oklahoma. All property of the District shall be at all times exempted from forced sale, and nothing in this Act contained shall authorize the sale of any of the property of the District under any judgment rendered in any suit, and such sales are hereby prohibited and forbidden.

SECTION 15. *Public Use of Lands—Attorney General.*

The District shall not prevent free public use of its lands for recreation purposes and for hunting and fishing except at such points where, in the opinion of the Directors, such use would interfere with the proper conduct of the business.

All public rights of way now traversing the areas to be flooded by the impounded waters shall remain open as a way of free public passage to and from the lakes created, and no charge shall ever be made to the public for right to engage in hunting, fishing, boating or swimming thereon.

The District shall, within one year, acquire by purchase or otherwise, two (2) strips of land, each to be at least one-fourth (1/4) mile in length along the shore line, sufficiently wide and so located that a shore road may be built thereon, which shall be connected with a public highway. Said strips shall be on different sides of said Pensacola Dam, one near the dam and the other near the headwaters. After acquiring said strips the Grand River Authority shall assign the same to the State of Oklahoma for park purposes, and the same shall be under the supervision and control of the State Conservation Commission, who shall keep said strips of land open to the public, without charge, so that the public in general may have access to the reservoir.

Upon it being called to the attention of the Attorney General of Oklahoma by any citizen of Oklahoma, that this section has not been complied with, it shall be the duty of the Attorney General of Oklahoma to institute the proper

legal proceedings to require said District, or their successors, to comply with the provisions of this section.

Provided, that if any of the land owned by the District bordering the lakes to be created under the authority of this Act be sold by the District, the District shall retain in each tract a strip twenty (20) feet wide abutting the high water line of the lake for the purpose of passage and use by the public for public sports and amusements, *provided*, *further*, however, that this provision shall not apply to any sales of land by the District to any State or Federal agency to be used for game or fish sanctuaries, preserves, or for propagation purposes.

SECTION 16. *Bonds Exempt from Taxation.*

All bonds and the interest thereon issued pursuant to the provisions of this Act shall be exempt from taxation (except inheritance taxes) by the State of Oklahoma or by any municipal corporation, county or other political subdivision or taxing district of the state.

SECTION 17. *Bonds Authorized.*

This Act without reference to other statutes of the State of Oklahoma shall constitute full authority for the authorization and issuance of bonds, hereunder, and no other Act or law with regard to the authorization or issuance of obligations or the deposit of the proceeds thereof, or in any way impeding or restricting the carrying out of the acts herein authorized to be done shall be construed as applying to any proceedings taken hereunder or acts done pursuant hereto.

SECTION 18. *Construction of Act.*

This Act and all of the terms and provisions hereof shall be liberally construed to effectuate the purposes set forth herein.

SECTION 19. *Same.*

If any provision of this Act or the application thereof to any person or circumstance shall be held to be invalid, the remainder of the Act, and the application of such provision

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to other persons or circumstances, shall not be affected thereby.

SECTION 20. *Citation of Act.*

This Act may be cited as the Grand River Dam Authority Act.

SECTION 21. *Expiration Date.*

The terms of this Act, and the authority herein created shall expire on the 1st day of July, 1937, unless some part of the project set forth herein has been commenced by said date, otherwise to be in full force and effect.

Approved April 26, 1935."

Chapter 70, Art. 1-2, S. L. Okla. 1936-7.

"Article 1.

GRAND-RIVER DAM AUTHORITY.

Senate Bill No. 299.

"AN ACT amending Section 21, Article 4, Chapter 70, Session Laws, 1935, relating to the time of the expiration of the Grand River Dam Authority; and declaring an emergency.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. *Grand River Dam Authority—Expiration Date.*

Section 21, Article 4, Chapter 70, Session Laws, 1935, is hereby amended to read as follows:

'Section 21. The terms of this Act, and the authority herein created shall expire on the 1st day of July, 1939, unless some part of the project set forth herein has been commenced by said date, otherwise to be in full force and effect.'

Approved April 8, 1937. Emergency."

"Article 2.

GRAND RIVER DAM AUTHORITY.

House Bill No. 3.

"AN ACT amending Section 1, Article 4, of Chapter 70, Oklahoma Session Laws of 1935, relating to Grand River Dam Authority and a conservation and reclamation district to be known as the Grand River Dam Authority. It to be a governmental agency, body politic and corporate, without power to mortgage or encumber any of its property or to alienate any of its property necessary to its business, or to levy taxes or assessments or to create any indebtedness payable out of taxes or assessments, or to pledge the credit of the State; fixing the boundaries thereof, and conferring certain powers thereto; all with and by the authority set forth in Section 31, of Article 2, of the Constitution of the State of Oklahoma.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. *Grand River Dam Authority.*

Article 4, of Chapter 70, Oklahoma Session Laws of 1935, is hereby amended to read as follows:

"Section 1. There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority" (hereafter called the District), and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Nowata, Ottawa, Tulsa, Wagoner, Sequoyah, McIntosh, Creek, and Okmulgee. Such District shall be, and is hereby declared to be a governmental agency, body politic and corporate, with powers of government and with the authority to exercise the rights, privileges, and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries for irrigation, power, and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation

and development of the forests, water and hydro-electric power of the State of Oklahoma.

'Nothing in this Act or in any other Act or law contained, however, shall be construed as authorizing the District to levy or collect taxes or assessments, or to create any indebtedness payable out of taxes or assessments, or in any manner to pledge the credit of the State of Oklahoma, or any subdivision thereof.'

Approved Jan. 28, 1937."

Chapter 70, Art. 1-2, S. L. Okla. 1939.

"Article 1.

GRAND RIVER DAM AUTHORITY.

Senate Bill. No. 139

AN ACT amending Section 3 and Section 6, Article 4, Chapter 70, Oklahoma Session Laws, 1935, relating to the Grand River Dam Authority; providing for the appointment by the Governor of a board of directors of five members who shall exercise all the powers, rights, privileges and functions of the authority; providing the term of office of said directors and prescribing their qualifications; providing for their removal; providing for the filling of vacancies; providing for the salary and expenses of the directors; providing for the time and place for the meeting of said directors; providing the place of domicile of said district; placing limitations upon the letting of contracts; providing the manner in which said contracts shall be let; providing for the keeping of proper records of said authority; requiring an audit of the affairs of said authority and declaring an emergency.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. *Board of Directors.*

Section 3, Article 4, Chapter 70, Session Laws of 1935, is hereby amended to read as follows:

Section 3. The powers, rights, privileges and functions of the district shall be exercised by a board of five (5) directors (herein called the Board), all of whom shall be residents of and freehold property taxpayers in the district, providing that not more than one of such directors shall be residents of the same county; *provided*, that no person shall be eligible for such appointment if he has, during the preceding three (3) years before his appointment, been employed by any utility company of any kind or character whatsoever whether publicly or privately owned; *provided, however*, that nothing in this Act shall be construed to prevent the appointment or service upon said Board by any of the present members of said Board; *provided further*, that no person holding a federal, state, county, city or town office, elective or appointive, shall be eligible to serve as a member of the Board of Directors. And *provided, further*, that such director shall have lived in said district five (5) years prior to his appointment. All of the directors shall be appointed by the Governor of the State of Oklahoma. The Governor shall appoint two (2) directors for a term expiring January 1, 1941, two (2) for a term expiring January 1, 1943, and one (1) for a term expiring January 1, 1945. At the expiration of the term of any director, another director shall be appointed by the same authority which appointed the director whose term has expired and this appointment shall be for a term of six (6) years.

Each director shall hold office until the expiration of term for which appointed and thereafter until his successor shall have been appointed and qualified unless sooner removed as in this Act provided. Any director may be removed by the Governor for inefficiency, neglect of duty, or misconduct in office, after ten days' written notice has been given said director. A vacancy resulting from a death or resignation, or for any other cause, shall be filled for the unexpired term of such director by the same authority which appointed him. Each director shall qualify by taking the official oath of office prescribed by general statute. Each director shall

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receive a fee of Ten (\$10.00) Dollars per day for each day spent in attending meetings of the Board; and in addition each shall be allowed his actual and necessary expenses and per diem incurred in attending to the business of the Authority when ordered to do so by the Board of Directors; and in attending the meetings of the Board. No director shall at the same time he is serving on the Board of Directors as a director, hold any other position with the Grand River Dam Authority, and shall draw no money or salary from the said Authority while he is a member of the Board except the Ten (\$10.00) Dollars per day for every day spent in attending meetings of the Board, and the proper expenses per diem incurred in attending to the business of the Authority, and in attending such meetings.

'The time and place of regular meetings and the manner in which special meetings may be called shall be set forth in the by-laws of the said Authority. Three (3) directors shall constitute a quorum at any meeting, and except as otherwise provided in this Act or in the by-laws all action may be taken by the affirmative vote of the majority of the directors present at any such meeting, except that no contracts which involve an amount greater than Ten Thousand (\$10,000.00) Dollars, or which is to run for a longer period of a year, and no bonds, notes, or other evidence of indebtedness, and no amendment of the by-laws, shall be valid unless authorized or ratified by the affirmative vote of three (3) directors.'

SECTION 2. *Domicile of District—Accounts and Records.*

Section 6, Article 4, Chapter 70, Session Laws 1935, is hereby amended to read as follows:

'The domicile of the District shall be in the City of Vinita, County of Craig, where the District shall maintain its principal office in charge of its general manager, until otherwise designated by the affirmative vote of three (3) directors. The District shall cause to be kept complete and accurate accounts conforming to approved methods of bookkeeping. Said accounts and all

contracts, documents, and records of the District shall be kept at said principal office. Said accounts and contracts shall be open to public inspection at all reasonable times. The Board shall cause to be made and completed within ninety days after the end of each calendar year, an audit of the books of account and financial records of the District for such calendar year, such audit to be made by an independent certified public accountant or firm of certified public accountants. Copies of a written report of such audit, certified to by said accountant or accountants, shall be placed and kept on file with the State Conservation Commission, with the Treasurer of the State of Oklahoma, and at said principal office, and shall be open to public inspection at all reasonable times.

Approved April 8, 1939. Emergency.

Article 2.

GRAND RIVER DAM AUTHORITY BONDS.

House Bill No. 653.

AN ACT amending Section 10 of Article 4, Chapter 70, of the Oklahoma Session Laws of 1935, providing that the Grand River Dam Authority is herein authorized to issue bonds for any corporate purposes, not to exceed Twenty-five Million (\$25,000,000) Dollars in aggregate principal amount; and declaring an emergency.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. *Bonds Authorized—Actions on Bonds.*

Section 10, Article 4, Chapter 70, Session Laws, 1935, is hereby amended to read as follows:

‘The District shall have power and is hereby authorized to issue from time to time, bonds as herein authorized for any corporate purpose, not to exceed Twenty-five Million (\$25,000,000) Dollars in aggregate principal amount; *provided*, that an amount of such bonds in aggregate sum of Ten Million (\$10,000,000) Dollars is authorized to enable the construction of dams

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at or near Markham Ferry and Fort Gibson and transmission lines at or near the location sites of said dams as shown in Document No. 107 of the First Session of the Seventy-sixth Congress, and for the purposes of further rural electrification within the district after the completion of the dams; *provided, further*, that the construction and completion of the Markham Ferry and Fort Gibson dams shall be in accordance with all the provisions of Article 4, Chapter 70, Session Laws, 1935, as amended by Article 2, Chapter 70, Session Laws, 1937, relating to the Pensacola Dam. Any additional amount of bonds must be authorized by an Act of the Legislature. Such bonds may either be (1) sold for cash, at public or private sale, at such price or prices as the Board shall determine, *provided* that the interest cost of the money received therefor, computed to maturity in accordance with standard bond tables in general use by banks and insurance companies, shall not exceed six per centum per annum, or (2) may be issued on such terms as the Board shall determine in exchange for property of any kind, real, personal, or mixed, or any interest therein which the Board shall deem necessary or convenient for any such corporate purpose, or (3) may be issued in exchange for like principal amounts of other obligations of the District, matured or unmatured. The proceeds of sale of such bonds shall be deposited in such bank or banks or trust company or trust companies, and shall be paid out pursuant to such terms and conditions, as may be agreed upon between the District and the purchasers of such bonds. All such bonds shall be authorized by resolution or resolutions of the Board concurred in by at least three of the members thereof, and shall bear such date or dates, mature at such time or times, bear interest at such rate or rates (not exceeding six per centum (6%) per annum) payable annually or semi-annually, be in such denominations, be in such form, either coupon or registered, carry such registration privileges as to principal only or as to both principal and interest, and as to exchange of coupon bonds for registered bonds or vice versa, and ex-

change of bonds of one denomination for bonds of other denomination, be executed in such manner and be payable at such place or places within or without the State of Oklahoma, as such resolution or resolutions may provide. Any resolution or resolutions authorizing any bonds may contain provisions, which shall be part of the contract between the District and the holders thereof from time to time (a) reserving the right to redeem such bonds at such time or times in such amounts and at such prices, not exceeding one hundred and five per centum of the principal amount thereof, plus accrued interest, as may be provided, (b) providing for the setting aside of sinking funds or reserve funds and the regulation and disposition thereof; (c) pledging to secure the payment of the principal of and interest on such bonds and of the sinking fund or reserve fund payments agreed to be made in respect of such bonds all or any part of the gross or net revenues thereafter received by the District in respect of the property, real, personal, or mixed, to be acquired and/or constructed with such bonds or the proceeds thereof, or all or any part of the gross or net revenues thereafter received by the District from whatever source derived, (d) prescribing the purposes to which such bonds or any bonds thereafter to be issued, or the proceeds thereof, may be applied, (e) agreeing to fix and collect rates and charges sufficient to produce revenues adequate to pay the items specified in Subdivisions (a), (b), (c) and (d) of Section 8 hereof, and prescribing the use and disposition of all revenues, (f) prescribing limitations upon the issuance of additional bonds and upon the agreements which may be made with the purchasers and successive holders thereof, (g) with regard to the construction, extension, improvement, reconstruction, operation, maintenance and repair of the properties of the District and carrying of insurance upon all or any part of said properties covering loss or damage or loss of use and occupancy resulting from specified risks, (h) fixing the procedure, if any, by which, if the District shall so desire, the terms of any contract with the holders of such

bonds may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given, (i) for the execution and delivery by the District to a bank or trust company authorized by law to accept trusts, or to the United States of America or any officer or agency thereof, of indentures and agreements for the benefit of the holders of such bonds setting forth any or all of the agreements herein authorized to be made with or from the benefit of the holders of such bonds and such other provisions as may be customary in such indentures or agreements; and (j) such other provisions, not inconsistent with the provisions of the Act, as the Board may approve.

Any such resolution and any indenture or agreement entered into pursuant thereto may provide that in the event that (a) default shall be made in the payment of the interest on any or all bonds when and as the same shall become due and payable, or (b) default shall be made in the payment of the principal of any or all bonds when and as the same shall become due and payable, whether at the maturity thereof, by call for redemption or otherwise, or (c) default shall be made in the performance of any agreement made with the purchasers or successive holders of any bonds, and such default shall have continued such period, if any, as may be prescribed by said resolution in respect thereof, the trustee under the indenture or indentures entered into in respect of the bonds authorized thereby, or, if there shall be no such indenture, a trustee appointed in the manner provided in such resolution or resolutions by the holders of twenty-five per centum in aggregate principal amount of the bonds authorized thereby and at the time outstanding may, and upon the written request of the holders of twenty-five per centum in aggregate principal amount of the bonds authorized by such resolution or resolutions at the time outstanding, shall in his or its own name, but for the equal and proportionate benefit of the holders of all of such bonds, and with or without possession thereof:

(1) By mandamus or other suit, action or proceeding at law or in equity, enforce all rights of the holders of such bonds,

(2) Bring suit upon such bonds and/or the appurtenant coupons,

(3) By action or suit in equity, require the District to account as if it were the trustee of an express trust for the bondholders,

(4) By action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such bonds, and/or,

(5) After such notice to the District as such resolution may provide, declare the principal of all of such bonds due and payable, and if all defaults shall have been made good, then with the written consent of the holder or holders of twenty-five per centum in aggregate principal amount of such bonds at the time outstanding, annul such declaration and its consequence; *provided, however,* that the holders of more than a majority in principal amount of the bonds authorized thereby and at the time outstanding by instrument or instruments in writing delivered to such trustee have the right to direct and control any and all action taken or to be taken by such trustee under this paragraph. Any such resolution, indenture or agreement may provide that in any such suit, action, or proceeding, any such trustee, whether or not all of such bonds shall have been declared due and payable, and with or without possession of any thereof, shall be entitled as of right to the appointment of a receiver who may enter and take possession of all or any part of the properties of the District and operate and maintain the same, and fix, collect, and receive rates and charges sufficient to provide revenues adequate to pay the items set forth in subparagraphs (a), (b), (c) and (d), of Section 8 hereof, and the costs and disbursements of such suit, action or proceeding, and to apply such revenues in conformity with the provisions of this Act and the resolution

or resolutions authorizing such bonds. In any suit, action or proceeding by any such trustee, the reasonable fees, counsel fees and expenses of such trustee and of the receiver or receivers, if any, shall constitute taxable disbursements and all costs and disbursements, and all costs and disbursements allowed by the court shall be a first charge upon any revenues pledged to secure the payment of such bonds. Subject to the provisions of the Constitution of the State of Oklahoma, the courts of the County of Craig, or other county wherein the domicile may be situated, shall have jurisdiction of any such suit, action or proceeding by any such trustee on behalf of the bondholders and of all property involved therein. In addition to the powers hereinabove specifically provided for, each such trustee shall have and possess all powers necessary or appropriate for the exercise of any thereof, or incident to the general representation of the bondholders in the enforcement of their right.

Before any bonds shall be sold by the District, a certified copy of the proceedings for the issuance thereof, including the form of such bonds, together with any other information which the Attorney General, of the State of Oklahoma, may require, and shall be submitted to the Attorney General, and if he shall find that such bonds have been issued in accordance with law, and if he shall approve such bonds, he shall execute a certificate to that effect which shall be filed in the office of the Auditor of the State of Oklahoma and be recorded in a record kept for that purpose. No bonds shall be issued until the same have been registered by the Auditor, who shall so register the same if the Attorney General shall have filed with the Auditor his certificate approving the bonds and the proceedings for the issuance thereof as hereinabove provided. All bonds approved by the Attorney General as aforesaid, and registered by the Auditor as aforesaid, and issued in accordance with the proceedings so approved shall be valid and binding obligations of the District and shall be incontestable for any cause from and after the time of such registration.

Approved May 12, 1939. Emergency."

APPENDIX II.

Condemnation—Oklahoma Constitution and Statutes.

Okla. Constitution, Art. 2, Sec. 23:

Private Property Not to Be Taken for Private Use. No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law. (Bunn's Ed., Sec. 32.)

Okla. Constitution, Art. 2, Sec. 24:

Private Property—Condemnation—Damages—Right of Way. Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question. (Bunn's Ed., Sec. 33.)

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Okla. Stat. 1931, Sec. 11,931:

Taking by Eminent Domain—Commissioners. If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this State, may desire to locate its road, shall refuse to grant the right of way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten days' notice to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member of his family over fifteen years of age, or, in case of his nonresidence in the State, by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge from the regular jury list of names as commissioners, and who must not be interested in a like question. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of said railroad, and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvement proposed; and they shall forthwith make report in writing to the clerk of the said court setting forth the quantity, boundaries and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner: which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county where the land lies, to be by him filed and recorded (without further acknowledgment or proof), in the same manner and with like force and effect, as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

Idem., Section 11,932:

Owner Entitled to Immediate Compensation. When possession is taken of property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation.

Okla. Stat. 1931, Sec. 11,935:

Eminent Domain and Condemnation Proceedings by Railroads—Provisions Applicable to Others Having Right of Eminent Domain—State and Municipal Corporations. The provisions of this article with reference to eminent domain shall apply to all corporations having the right to eminent domain, and shall apply to the State of Oklahoma and its various educational, reformatory, penal and eleemosynary institutions, including departments of state having the power to purchase real property for public purposes, and such institutions and departments shall have the right under this article to acquire fee simple title to the property taken. When the State of Oklahoma through the managing board or commission of the institution or department of state concerned is unable to purchase any real property needed for any such institution or department, condemnation proceedings to take the same and to pay damages therefor may be instituted in the name of the State of Oklahoma by the managing board or commission of the institution or department of state involved; and all such institutions and corporations shall have the right, under the provisions of this article, to acquire right of way over, under, along or across the property or right of way of any other such corporation, not inconsistent with the purpose for which such property was taken or acquired. In all cases of condemnation of property for either public or private use, the determination of the character of the use shall be a judicial question; and the procedure shall be as provided herein: *Provided*, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article,

any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings.

Okla. Stat. 1931, Sec. 10,049:

Eminent Domain Extended to Oil Pipe Lines Same as Railroads. Any oil pipe line company organized under the laws of this State shall have power to exercise the right of eminent domain in like manner as railroad companies, for the purpose of securing rights of way and sites for pumping stations, storage tanks and depots.

Idem., Sec. 10,050:

Right Extended to Water-Power Companies. Any water-power company, organized under the laws of this State, shall have power to exercise the right of eminent domain in like manner as railroad companies, for the purpose of securing sites for the erection of water-power plants, together with the necessary dams over any non-navigable stream and sites for the storage of water, and of securing rights of way for the necessary flumes and conduits for the purpose of conducting water for public or private consumption, and generating power, and for the purpose of securing rights of way for poles, wire and cables for transferring and transmitting electricity generated by water.

Okla. Stat. 1931, Sec. 10,051:

Municipalities—Right of Eminent Domain. Any county, city, town, township, school district or board of education, or any board or official having charge of cemeteries created and existing under the laws of this State, shall have power to condemn lands in like manner as railroad companies, for highways, rights of way, building sites, cemeteries, public parks and other public purposes.

Idem., Sec. 10,052:

Others Who May Exercise the Right. Any private person, firm or corporation shall have power to exercise the right of eminent domain in like manner as railroad companies for private ways of necessity or for agriculture, mining and sanitary purposes.

Chap. 50, Art. 12, Sec. 2, Okla. S. L. 1937:

Eminent Domain. For the purpose of carrying out the provisions of this Act, the State Highway Commission and the Board of County Commissioners of each county of the State of Oklahoma are hereby given the right of eminent domain and may bring condemnation proceedings to acquire the right of way for lake, park or pond sites. Said powers conferred herein shall be exercised in conformity with the existing statutes relative to the right of eminent domain and condemnation for railroad corporations. Payment shall be made for the rights of way so acquired out of any funds in the hands of the State Highway Construction and Maintenance Fund, if condemned by such Commission, or the County Highway Construction and Maintenance Fund, if condemned by the county; and so much of said funds as may be necessary to carry out the provisions of this Act are hereby appropriated for such purpose.

Approved April 26, 1937. Emergency.

Okla. Stat. 1931, Sec. 10,046:

Certain Lands Subject to Right of Eminent Domain. The lands set apart for the use and benefit of the State of Oklahoma for public schools, for public buildings and educational institutions, either by congressional enactment or executive reservation, are hereby declared to be subject to the right of eminent domain in behalf of any of the public enterprises now authorized by law to condemn private property for mills, sewers, railroads, side-tracks, station-grounds and other municipal or corporate public uses, and all of the laws of this State with reference to the taking of private property for public use are hereby made applicable to the said lands.

Idem., Sec. 10,047:

Condemnation Procedure. Before any public corporation, municipality or other entity or person authorized to exercise the right of eminent domain under existing law, shall have the right to condemn or take any part of such lands, a plat of the grounds proposed to be taken, showing the part of the particular subdivision, shall be prepared

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and filed with the governor of the State, together with a sworn statement of the engineer or superintendent in charge of such public work, that the taking of such lands is necessary to the exercise of the powers of such municipality or corporation; and it shall be the duty of the governor to appoint three disinterested persons, resident householders of the county in which such land is located, who shall first take an oath to fairly and impartially appraise the value of the ground so taken, and the damage to the remaining parts of such subdivision by the taking thereof, and the said appraisers shall notify the governor and the officers of such corporation of the time and place when they will proceed to appraise such damage; and at such time and place, upon actual view of the premises, the said appraisers shall meet and appraise the damage, in writing, and return one copy thereof under their signatures to the governor of the State, and one copy to the principal officer of such corporation or municipality in charge of such construction, and if either party is aggrieved they may, within ten days, appeal to the district court of the county where such land is located, in the same manner that appeals are taken from judgment of justices of the peace, where the amount of such damage shall be tried by a jury, as other causes are tried. In case no appeal is taken from the award of such appraisers, such corporation or municipality shall have the right to occupy such grounds by the paying into the state treasury the amount of such award. In case either party appeals, such corporation or municipality shall have the right to occupy such grounds upon giving bond in treble the amount of the award, with sureties to be approved by the clerk of the district court where such appeal is pending, to the effect that the corporation or municipality will pay said award if such appeal be dismissed, or shall pay any judgment finally rendered in said action if the same shall be tried.

Okla. Stat. 1931, Sec. 13,283:

Entry After Deposits of Award. No property shall be taken under this Act until compensation fixed by appraisal, agreement, donation or condemnation has been paid, according to law.

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